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ONTARIO LABOUR RELATIONS BOARD REPORTS



January 1987



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

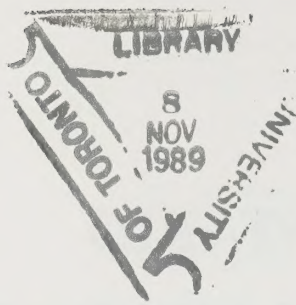
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1318-86-U United Food and Commercial Workers International Union, Local 1000A, Complainant, v. 659402 Ontario Limited c.o.b. as Anderson's City Farm Valu-Mart, Respondent

Change in Working Conditions - Unfair Labour Practice - Employer implementing Sunday hours during freeze period - Process of selection of employees to work voluntary - Due to uniqueness of Sunday, change beyond the employer's protected scheduling rights - Breach of s.79 - No remedial relief awarded

BEFORE: Judge R. S. Abella, Chairman, and Board Members J. A. Rundle and J. Sarra.

APPEARANCES: Bram Herlich and William Cox for the complainant; J. Paul Wearing and Roy Anderson for the respondent.

DECISION OF JUDGE R. S. ABELLA, CHAIRMAN AND BOARD MEMBER J. SARRA;
January 26, 1987

1. This is a complaint pursuant to section 89 of the *Labour Relations Act* alleging a violation of section 79 of the Act. The union called no *viva voce* evidence. On the consent of both parties, the following Agreed Statement of Facts was introduced as forming the basis of the complainant's case:

AGREED STATEMENT OF FACT

1. The Complainant Union was certified to represent employees of the predecessor employer on August 2, 1985. Two certificates were issued, one in respect of full-time employees the other in respect of part-time employees.
2. On or about August 14, 1985 the Complainant Union served the predecessor employer with notice to bargain. Negotiations followed.
3. Several items were agreed to between those parties including, inter alia, a six day work week: Monday to Saturday inclusive.
4. In or about March or April of 1986 the predecessor employer sold its business to the Respondent Employer.
5. The Union was informed of the change or proposed change of ownership in March and arrangements were made to continue negotiations for a collective agreement as evidenced in a letter from William Cox to J. Paul Wearing dated March 19, 1986 and attached hereto as Exhibit #1.
6. On April 11, 1986 the Union provided the employer with "formal notification" of desire to bargain (Attached hereto as Exhibit #2).
7. On April 14, 1986 the Employer, through counsel, acknowledged its status as a successor employer (Attached hereto as Exhibit #3).
8. The parties met in negotiations on April 9, 1986. At that meeting the employer indicated that it was not in agreement with the six day work week agreed to between the Union and the predecessor employer.
9. In or about the end of June the Employer requested that the union consent to the Employer opening its store to the public on Sundays. The Union declined to consent.

10. On July 7, 1986 the Employer indicated its intention to commence Sunday operations effective July 13, 1986 (Attached hereto as Exhibit #4).

11. On July 13, 1986 the Employer opened its store to the public. The store has continued to be open on Sundays since that date.

12. When the store is open on Sundays, the total area used for serving the public or for selling or displaying to the public is in excess of 2400 square feet.

13. When the store is open on Sundays the number of persons engaged in the service of the public exceeds three.

14. Charges have been laid against the Employer for alleged violation of the *Retail Business Holidays Act*.

15. The parties have had several meetings with a conciliation officer between June 23, 1986 and September 16, 1986.

16. A "no board" report was issued on or about September 29, 1986.

17. Prior to conciliation [sic] and prior to the implementation of Sunday hours the parties had agreed to a "just cause" clause to ultimately be included in a collective agreement. This clause is in the following form:

The Union acknowledges that it is the exclusive function of the Employer to:

.

(b) hire, classify, direct, assign, promote or demote and lay-off employees or otherwise discipline or discharge employees for just and sufficient cause.

.

18. The parties agree that the implementation of Sunday Hours occurred during the freeze period contemplated by Section 79(1) of the Labour Relations Act.

19. The store, whether under the operation of the Respondent Employer or predecessor Employer(s) has never, prior to July 13, 1985, been open to the public on Sundays.

2. The employer introduced Sunday openings in response to business pressure brought on by the opening on Sundays of several neighbouring competitors, most recently in April. In the absence of union consent, the employer posted a notice advising employees of its intention to remain open Sundays commencing July 13, 1986. The notice stated in part:

"... Any employees wishing to volunteer for working Sundays - Please contact your Dept. Mgr. by Wed. July 9/86".

As a result of the posting, several employees volunteered and thereafter the voluntary process continued to operate. Roy Anderson, on behalf of the employer, gave uncontradicted evidence that the process of selection was entirely voluntary throughout.

3. The employment practice in the respondent's store had traditionally been a 5 day, 8 hours-per-day work week for full-time employees. This did not change with the introduction of Sunday openings. No employee lost time or wages and none was required to work Sundays if he or she chose not to.

4. The union contends and the employer does not deny, that the store had never before been open Sundays. The union therefore alleges that employees had, prior to the "freeze", the

privilege of not working Sundays. In the absence of the union's consent, the introduction of Sunday openings violated the freeze by interfering with this privilege. The union argued further that Sunday openings *prima facie* offended the provisions of the *Retail Business Holidays Act* and that employees would not reasonably expect store openings on a day declared by this latter Act to be a legal holiday.

5. It is not clear whether this particular respondent's business falls within the class of retail business required by the *Retail Business Holidays Act* to be closed on Sundays nor are we called upon to make that assessment. Neither are we in this case called upon either to condone or condemn the propriety of Sunday openings. The issue before us is a narrow one: Is the respondent's introduction of Sunday openings in the absence of the union's consent, a violation of the freeze provisions of the *Labour Relations Act*.

6. The jurisprudence pursuant to section 79 of the Act makes clear that the purpose of this freeze provision is to preserve a defined and understood status quo during this period with the overall objective of facilitating a stable environment within which parties can concentrate on meaningful collective bargaining. Although it is not easy in every case to identify what this defined and understood status quo entails, particularly where there has been no prior collective agreement or where the contentious event is a first occurrence, recourse can always be had to the language of section 79 with this purposive interpretation in aid. The development by the Board of flexible interpretive tools such as the "reasonable expectations" and "business as usual" tests are evolutionary illustrations of a long-standing practice of construing the section in a way which acknowledges the sanctity of its purpose, recognizes the limits of its ability to be categorical, and authorizes a singular determination in every case based on existing jurisprudence but dependent on the factual variables before the panel. In other words, the integrity of the status quo will not be permitted to be violated, but respect will be paid to the possibility that it is not every change which violates this integrity.

7. If one views the section as intending to freeze a status quo, then one must assess the impact of the change on the range of expectations expected to be frozen during this period. From the union's point of view, does the change interfere with its reasonably expected representation rights and duties or with its ability to execute them? From the employees' point of view, does the change interfere with terms, conditions, rights, duties or privileges of employment previously enjoyed and reasonably expected to continue. And from the employer's point of view, does the change interfere with any of his or her rights, privileges or duties reasonably arising out of a pre-existing pattern of management in the particular business?

8. In the case before the Board, the employer, in responding to market exigencies, decided to keep the store open Sundays despite the fact that it had never before been open on Sundays. The union withheld its consent, arguing that its agreement could potentially attract liability to individual employees who are, along with an employer, subject to potential conviction and a \$10,000 fine if found to contravene the *Retail Business Holidays Act*. Does the Sunday opening violate the freeze provision in the absence of union consent or is it, by virtue of its impact on the union or employees, outside the grasp of the section's purpose?

9. The employer maintained the 8 hour day, 5 day per week schedule and offered, instead, alternative hours to employees in which to work. The union does not suggest that the employer's pre-existing pattern of management excludes the right or duty to arrange shifts based on the need for services, but argues that opening on Sundays is not "business as usual". We agree. Although section 79 freezes and protects the employer's ability to manage an operation, including the ability to respond to market pressures in the arrangement of hours or the range of services or operations,

it must do so in a manner reasonably predictable based on its former practices. The fact that this may involve an extension or expansion which has staffing or scheduling implications does not necessarily mean that the employer is precluded from doing so without the union's consent. But by opening on Sundays, the respondent employer was adding a day uniquely protected by its legal and social history as a non-working day. By virtue of this uniqueness, and without passing judgment on the morality or legality of Sunday openings, we find that a change has unilaterally occurred which is technically beyond the ambit of the respondent's protected scheduling rights.

10. In all the circumstances of this case, and for all the foregoing reasons we find that by opening on Sundays, the employer has not conducted its business as usual, and there has therefore been a breach of section 79 of the *Labour Relations Act*. In our view, however, this is not an appropriate case in which to grant remedial relief.

DECISION OF BOARD MEMBER J. A. RUNDLE;

1. I dissent from the decision of the majority.

2. The majority finds, and the union conceded, that section 79 protects the employer's ability to manage its operation including its ability to respond to market pressures in the arrangement of hours in the range of operations. I agree with the majority on this point.

3. It is also beyond doubt that this protected right of the employer includes the right to respond to a market pressure it faces for the first time. Thus in *Grey Owen Sound Joint Homes for the Aged*, [1983] OLRB Rep. Apr. 522 at para. 28, the Board stated "It surely cannot be the intent of the legislation and the cases to tie the hands of the employer by prohibiting the employer facing the problem for the first time to determine a way in which to respond..." In this case, the employer for the first time faced the problem of its competitors opening on Sundays and it was entitled to respond to that market pressure.

4. From the employees' point of view, as the majority decision states, Sunday work was allocated on a voluntary basis only and no employee lost time or wages as a result of Sunday openings. Those employees who wished to work could do so, those who didn't wish to work were not required to. To that extent in my view there was no alteration of any right or privilege of employees within the meaning of section 79.

5. While the majority accepts the employer's right to respond to the market pressures it finds that the respondent employer's response, ie. Sunday openings, was a violation of the freeze. This finding is based on the majority's view that Sunday is "a day uniquely protected by its legal and social history as a non-working day". With respect I disagree.

6. It is implied in the decision of the majority (paragraph 5) that there is no blanket prohibition against Sunday openings in the *Retail Business Holidays Act*. Indeed health care facilities, certain businesses in the entertainment sector and retail businesses in tourist areas are all open Sundays. The Board heard no evidence on whether or not that Act applied to the respondent employer's business. Nor is the Board called upon to decide on the propriety of Sunday openings. In the circumstances, in my view the legality issue and the impact of the *Retail Business Holidays Act* is irrelevant to the issue before the Board. When no weight is attached to the special legal status of Sunday the conclusion is inevitable that the employer's conduct in this case was protected under section 79 as a business decision in response to a new market pressure.

7. I would have so found and dismissed this complaint.

0855-85-R Ontario Public Service Employees Union, Applicant, v. Ottawa Day Nursery Inc. c.o.b. as Andrew Fleck Child Centre, Respondent

Certification - Dependent Contractor - Home day care workers dependent contractors - Source of funding irrelevant to determination

BEFORE: *D. E. Franks*, Vice-Chairman, and Board Members *J. A. Ronson* and *W. F. Rutherford*.

DECISION OF D. E. FRANKS, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; January 22, 1987

1. This is an application for certification. By a previous decision this Board ordered a vote of certain employees of the respondent to be conducted by mail. The ballot box was directed sealed pending the resolution of the status of the persons sought to be represented by the applicant. The bargaining unit is essentially a bargaining unit of home day care providers working for the respondent in the Ottawa-Carleton area. At the hearing in this matter, the respondent took the position that these providers were not employees but were rather independent contractors. The applicant trade union took the position that whether or not they were, they were at least dependent contractors within the meaning of section 1(1)(h) of the Act and the applicant was therefore entitled to certification of such persons pursuant to the dependent contractor provisions of the Act.
2. The persons whom the applicant is seeking to represent are referred to as providers. They are part of a program to provide an alternative to institutional day care by providing in their homes day care services for a limited number of children. In this regard the role of the respondent is primarily that of a clearing house. That is, the Centre maintains a list of providers who are prepared to accept children into their homes and on the other hand when a parent or parents apply for such day care the role performed by the Centre is to match the parent with a provider.
3. As noted above, the respondent keeps a list of potential providers. When people apply for the position of provider they are interviewed and their home is inspected and eventually if everything is acceptable they go on the list of providers. Both the qualifications and the home of the provider are the subject of extensive regulation by both the Province and the respondent Centre. When a potential match is made between a parent and a provider the Centre sets up a meeting between the parent and the provider and either can refuse to enter into the relationship. The number and the ages of the children in any particular provider's home is quite strictly controlled. Nevertheless, payment (although according to a schedule) roughly depends upon the amount of service provided by the provider. Payments are made by the respondent on the basis of records kept by the provider.
4. Although some of the providers provide services for parents who pay, much of the fee comes from in effect the welfare payments by the municipality through the respondent Centre. In this regard, the schedule of payments made to providers is in effect set by the municipality rather than the agency itself.
5. Counsel for the respondent argues that on the facts of the present case that the providers are not employees of the respondent Andrew Fleck Centre. He thus argues that in the matter of control for instance that the control over the providers is imposed totally by outside powers. That basically the various provincial regulations concerning the safety and the well-being of the children are outside both the agency and the provider. However, he notes the providers are free to determine their own workload, that is, the number of children that they will accept provided it is

within the regulated limit. He further points out that the ownership of tools is essentially in the hands of the provider like any other independent contractor. Other indicia that the providers are not employees but independent contractors relates to the lack of income tax deductions made by the respondent for the various providers.

6. Counsel for the applicant points out that it is not necessary for the Board to find that the providers be employees of the respondent as distinct from independent contractors. It is sufficient for the Board to simply find that the providers are dependent contractors. In order to be dependent contractors, the Board must find two things:

- (1) the contractor must be in a position of economic dependency closely analogous to that of an individual employee; and
- (2) the contractor must be under an obligation to perform duties for the client roughly analogous to the obligation an individual employee has to perform duties for an employer.

7. In our view, the provider is a dependent contractor with respect to the respondent Centre. The source of the economic dependency is primarily that the provider relies mainly on the Centre for available work and further on the evidence before us, it is clear that most of the work performed by the providers does come from the respondent Centre rather than being obtained by the individual provider.

8. It is also clear that the provider is under an obligation to perform the duties similar to that of an employee. Indeed, as we have noted earlier, the activity of the providers is extensively regulated and the respondent plays a significant role in the enforcement of those regulations ensuring that the performance of the duties required of the provider by the *Child Welfare Act* are complied with. In our view, the required duties are more than simply analogous to the obligation that would be held by an employee to an employer.

9. It should be noted that several matters raised by the respondent are irrelevant to the determination of whether or not the providers are dependent contractors. Thus, the source of the funding and the fact that that source may affect collective bargaining is not relevant to determination of whether or not the providers are dependent contractors.

10. In our view, therefore, the providers are to be viewed as dependent contractors and therefore employees of the respondent. That being the case, the Board hereby directs the Registrar to count the ballots cast in this matter.

DECISION OF BOARD MEMBER J. A. RONSON;

For the reasons best expressed by my colleague Mr. W. H. Wightman in *Cradleship Creche of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 225, I find that the providers are not dependent contractors as contemplated by the Act.

2864-85-M International Union of Operating Engineers Local 793, Applicant, v. Arlington Crane Service Limited, Respondent, v. Operating Engineers Employer Bargaining Agency, Intervener

Charter of Rights and Freedoms - Construction Industry Grievance - Evidence - Practice and Procedure - Respondent objecting to lack of particularity in grievance - Any evidence relevant to issue of violation of collective agreement admissible whether or not specific instances have been particularized - Board determining procedure to be followed in entertaining Charter argument in this case

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *F. W. Murray* and *D. A. Patterson*.

APPEARANCES: *Bernard Fishbein* and *E. A. Ford* for the applicant; *Thomas A. Stefanik*, *Lynn Bevan*, *Dorothy Foran* and *Ron Foran* for the respondent; *Jim Thomson* for the intervener.

DECISION OF THE BOARD; January 19, 1987

1. The hearing in this referral of a grievance to arbitration under section 124 of the *Labour Relations Act* continued before the Board on January 5 and 6, 1987. The Board received detailed submissions from counsel with respect to the scope of the grievance. After receiving the submissions of all counsel, the Board recessed and returned to deliver the following oral ruling:

This is the continuation of a hearing of a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*. The grievance was dated October 31, 1985 and it was delivered to the respondent shortly after that date. See the decision of this panel in this case dated April 25, 1986.

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 793

.....

STYLE OF GRIEVANCE (a) ~~EMPLOYEE GRIEVANCE~~ (Strike out (a) or (b) if not applicable)
(b) UNION GRIEVANCE

Employer Bargaining Agency and its affiliate
EMPLOYER CONCERNED: Arlington Crane Service Limited

PROJECT SITE: Various

TYPE OF AGREEMENT Provincial Agreement

SECTION(S) OF AGREEMENT VIOLATED Master Portion, Articles 2, 3, 13, 14 and
24. Schedule 'A', Article 5.

TIME PERIOD CONCERNED October 31, 1985 and continuing.

THIS GRIEVANCE IS FILED ON BEHALF OF Local 793, I.U.O.E. on behalf of
its members.

THE NATURE OF THE GRIEVANCE IS AS FOLLOWS:

The company did engage a sub-contractor (equipment rental) who is not in contractual relations with this local.

The company are employing other than members of Local 793, I.U.O.E. in the capacity of frontend men contrary to the collective agreement.

REMEDY REQUESTED: That the company only employ members of Local 793, I.U.O.E., for the classification of frontend men. That the company engage only those sub-contractors who are in contractual relations with this union to perform work set out in the classifications. That the company pay the amount equal to 8 hours pay plus vacation pay, pension, welfare, training fund, E.B.A. fund for all days worked by other than members of this local.

ACTION TAKEN - OR COMPANY COMMENTS:

SIGNED BY COMPANY

SIGNED BY (a) - ~~Employee~~
(b) Union

Date Oct. 31, 1985

(Please make out in three copies)

That grievance was referred to the Board under section 124 of the Act for arbitration on February 21, 1986.

Counsel for the respondent promptly objected to the lack of particularity in the grievance.

Counsel for the applicant advised us that it only seeks relief in respect of Article 3 of the collective agreement.

By letters delivered to counsel for the respondent at various times between our hearing in April, 1986 and today, counsel for the applicant provided further particulars of the alleged violations.

The parties have requested the Board to determine at the outset of this hearing whether the applicant can lead evidence about incidents of which it is unaware and has not particularized that would establish a violation of Article 3 of the collective agreement. It intends to introduce this evidence through representatives of the respondent who have been served with summons to witness.

Counsel for the respondent submits that to permit the applicant to call evidence about unparticularized allegations would permit the applicant to engage in a fishing expedition, and, by reason of an earlier decision of the Board, differently constituted, that directed the respondent to cease and desist from violating the collective agreement, would expose the respondent to penal consequences. Therefore, the Board should not, or cannot, amend the grievance so as to permit it to conform to the evidence that will be called during the hearing.

The respondent is in the mobile crane rental business. The locations of the work that it performs are constantly changing. In our opinion, the appropriate perspective to use in dealing with the arguments presented to us is set out in *Master Insulation Company Limited*, [1981] OLRB Rep. Jan. 94 at 103-104:

"The Board is not without concern about grievances referred to it which only broadly allege violation of the collective agreement, even when they are specific as to the sections alleged to have been breached. It will not permit its broad powers and its procedures to be abused by a party seeking to learn whether in fact it has a grievance. Any party which refers a grievance that is so broadly stated as to raise that suspicion runs the risk either of delay in having its grievance determined or having the Board rule that it is so lacking in specificity as to be not arbitrable. On the other hand, the Board must be sensitive to the realities of the construction industry with its scattered job sites and the large number of small employers and the difficulties which these conditions create even for a trade union which attempts diligently and assiduously to assert its bargaining rights and police its collective agreements. There are many ways by which an employer who is bent on ignoring his responsibility under a collective agreement can obscure his presence on a job site. This makes it difficult for a union to know whether an employer with whom it has an agreement is performing work at all. Once a union learns of an employer's presence on a job, it may be able only to determine that the employer is performing work for which the union claims jurisdiction under the collective agreement. That may be the extent of the information on which it must rely to file a grievance. In these circumstances, the Board cannot set hard and fast conditions for specificity and particularity but must look at each grievance on its

merits if it is challenged as being too lacking in its particulars or not specific enough in stating the alleged violation.

... Particularly where it is apparent, as it is here, that the employer is ignoring one of the major job security provisions of its collective agreement (i.e., the sub-contracting provision) or where it is evident that no effort has been made to comply with important protection provisions of an agreement, there is no sound reason why the arbitrator cannot deal with the continuing violations where the grievance alleges that there are continuing violations and they do continue after the filing of the grievance, including while the matter is still before the arbitrator. See *Williams Contracting Ltd.*, [1980] OLRB Rep. July 1115, at paragraph 29."

In *Williams Contracting Ltd.*, [1980] OLRB Rep. July 1115 the Board wrote at page 1131:

"It is accepted that a 'collective agreement is fundamentally different from an ordinary commercial contract', and this is particularly the case in the construction industry. See *Blouin Drywall Ltd. and United Brotherhood of Carpenters and Joiners of America* (1976), 57 D.L.R. (3d) 199 (Ont. C.A.). The parties to such agreements have ongoing relationships and a continuing violation ought to be the subject matter of one grievance. One arbitrator ought to be able to speak to the totality of the difference between the parties and provide a meaningful remedy. On the other hand, the applicant provided the Board with no compelling justification for our relief to speak to the future in the nature of *quia timet* relief. There is no evidence before the Board that the respondent will continue to avoid its obligations under the schedule now that these obligations are clear. The Board retains jurisdiction in all other issues related to remedy and the implementation of this decision."

The Ontario Court of Appeal in *Blouin Drywall Contractors Limited v. United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 8 O.R. (2d) 103 has also taken the view that a board of arbitration should deal with the real dispute between the parties. The Court wrote at page 108:

"When a board of arbitration is satisfied on the evidence that a party to a collective agreement is in breach thereof, it is the board's obligation to render its decision accordingly. However, that decision is not simply a statement of the finding of the board with respect to the allegation made in the grievance but is also the consequential order or award, if any, that is required to give effect to the agreement. Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed."

We do not accept the proposition that we should be unconcerned about the ability of one party to the dispute to discover and prove violations of the collective agreement. We must recognize what the realities of labour relations are. In this case, it is clear that the applicant has alleged that the respondent has, on and after October 31, 1985, violated Article 3 of the collective agreement by either improperly sub-contracting or hiring contrary to the collective agreement. The applicant has set out some specific examples in its particulars. In our opinion, to restrict the applicant in this case to calling evidence to establish only those specific instances and no others would not deal with "the real complaint" as the Court of Appeal suggested arbitration boards ought to do. The real complaint here is that the respondent has violated and

continues to violate Article 3 of the collective agreement. That is the scope of the grievance. Therefore, any evidence that is relevant to that issue, whether or not specific instances have been particularized, will be admissible unless there is some other ground for excluding such evidence.

In our view, to adopt the approach suggested by counsel for the respondent could result in rewarding employers who are continually in violation of the collective agreement for engaging in subterfuge in order to avoid being discovered.

2. Following the Board's oral ruling, the parties discussed the manner in which the Board should entertain the submissions of both the applicant and respondent relating to the *Canadian Charter of Rights and Freedoms*. Following those discussions, and over the luncheon recess, the parties agreed and the Board accepted their agreement with respect to the procedure to follow in this matter. The respondent takes the position that the relevant provision of the collective agreement is void by reason of it being contrary to the *Canadian Charter of Rights and Freedoms*. Counsel for the applicant takes the position that the *Canadian Charter of Rights and Freedoms* has no application to this issue. The parties agree that the preliminary issue of whether the relevant provision of the collective agreement is subject to the *Canadian Charter of Rights and Freedoms* should be dealt with by the Board first. Counsel for the respondent undertook to provide notice to the Attorneys General for Ontario and Canada in the form contemplated by the *Dominion Paving* case, [1986] OLRB Rep. July 946.

3. The parties agree that the Board should determine as a preliminary matter the issue of whether the relevant provision of the collective agreement is subject to the *Charter*. If the Board determines that it is not, the grievance will be dealt with on the merits. If the Board determines that the collective agreement provision is subject to the *Charter*, then the Board will entertain the evidence and the submissions of the parties with respect to both the grievance and the application of the *Charter*. However, there will be no evidence or submissions made with respect to section 1 of the *Charter* at this second stage of the proceeding.

4. Counsel for the applicant will provide an outline of the nature of its position and a list of authorities relating to the preliminary *Charter* issue within two weeks of January 7, 1986. At least three weeks prior to the scheduled hearing in this matter, counsel for the respondent will provide an outline of its position and a list of authorities relating to the preliminary *Charter* issue in reply to the applicant.

5. Depending on the Board's determination with respect to the merits of the grievance and whether there is *prima facie* violation of the *Charter*, the hearing will then continue in order to entertain the evidence and submissions of the parties with respect to section 1 of the *Charter*.

6. The parties also agreed that service of a summons to witness addressed to the officials of the respondent and conduct money may be served upon the offices of counsel for the respondent and such service shall be good and sufficient service upon the officials of the respondent.

7. The matter is referred to the Registrar to be listed for continuation of hearing before this panel of the Board.

0923-80-R United Food & Commercial Workers International Union, Local 175, Applicant, v. Ault Foods Limited, Respondent

Certification - Collective Agreement - Reconsideration - Application requesting a change of the name on Board certificate treated as request for reconsideration - Once collective agreement negotiated, certificate spent - Parties able to amend collective agreement to reflect change in corporate name - Reconsideration dismissed

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *David Patterson* and *Judith Rundle*.

DECISION OF THE BOARD; January 22, 1987

1. On December 29, 1986, the Minister of Labour received a letter from the Personnel and Industrial Relations Manager of Catelli Inc., to which was attached a joint application requesting a change of the name on an Ontario Labour Relations Board certificate issued on September 8, 1980. That certificate affirmed the union's bargaining rights for a unit of employees then working for Ault Foods Limited, "Catelli Division", at its warehouse operation in Brampton, Ontario. It was said that on May 24, 1986, the employer's corporate name had been changed from Ault Foods Limited, to Catelli Inc. The parties requested the Minister to amend the certificate accordingly. The Minister referred the matter to this Board, and we shall treat it as a request made pursuant to section 106(1) of the *Labour Relations Act* to amend the certificate granted on September 8, 1980; however, for the reasons set out below, it is our opinion, that the request for reconsideration is without merit and (on the basis of the material before us) unnecessary.

2. A Board certificate defines the initial scope of the union's bargaining rights, requires the employer to recognize the union for that bargaining unit, and gives the union a 'licence' to commence negotiations. However, once those negotiations have produced a collective agreement, it is that collective agreement (and in particular its "scope clause") which defines the parties and the extent of the union's bargaining rights. As the Board observed in *Gilbarco* [1971] OLRB Rep. March 155:

"...The parties are free to amend, alter, extend or abridge the bargaining rights contained in the certificate. Where bargaining rights in a collective agreement are not as extensive as those contained in a certificate, then that is *prima facie* evidence of the abandonment of that portion of the bargaining rights contained in the certificate but not contained in the collective agreement. In effect, the collective agreement supplants the rights given by the Board's certificate and the Board's certificate is spent once the collective agreement is signed. Or to put it another way, the best evidence of the bargaining rights extant are those contained in the collective agreement. In the same way as bargaining rights in a collective agreement supplant rights contained in a certificate, so too bargaining rights in subsequent collective agreements may supplant bargaining rights contained in prior collective agreements."

In this regard the Board was merely restating the views expressed by Laskin C.J.C. in *Beverage Dispensers and Culinary Workers Union, Local 835, et al vs. Terra Nova Motor Inn Ltd.* 74 CLLC ¶14,253 (S.C.C.) to the effect that 'once a collective agreement is negotiated the certificate has served its purpose and is, for all practical purposes, spent'. (See also *Chapples Limited* [1974] OLRB Rep. Dec.897.

3. We assume that following the issuance of the Board certificate six years ago, the union and the employer negotiated one or more collective agreements. Those agreements were, and the current one continues to be, the foundation of the union's bargaining rights. If the employer has

merely changed its name, there is nothing to prevent the parties, *on their own* from amending their collective agreement to reflect the change, and it appears that both parties are quite content to do so. There has been no failure on the employer's part to recognize the union's bargaining rights; moreover, for the reasons already mentioned, amending a *1980 certificate* would not, in itself, affect the collective bargaining status quo in 1987 or the terms of any collective agreement which may currently exist. Alternatively, if there has been more than a mere "change of name", and Catelli Inc. has acquired the business formerly carried on by Ault Foods Limited, then, pursuant to section 63 of the *Labour Relations Act*, "Catelli" would automatically be bound by the predecessor's collective agreement unless and until the Board otherwise declares. If there were any dispute about the scope of the bargaining rights which Catelli "inherited" (or if there were an intermingling of the employees of the two businesses) those matters could be canvassed and resolved by a successor rights application made pursuant to section 63.

4. For the foregoing reasons, the Board is of the view that it is neither necessary, desirable, or even useful to accede to the parties' request to reconsider and amend the above-mentioned certificate.

2480-86-M United Brotherhood of Carpenters and Joiners of America, Local 1316, Applicant v. Terrence Broome, Respondent

Adjournment - Collective Agreement - Construction Industry Grievance - Evidence - Applicant's failure to file collective agreement with its referral not grounds for granting respondent an adjournment - Board entertaining applicant's evidence about what respondent said in prior s.1(4) proceedings - Onus of proof on applicant but evidentiary burden shifting to respondent - Respondent calling no witnesses - Grievance allowed

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *D. A. MacDonald* and *C. A. Balentine*.

APPEARANCES: *David A. McKee* and *Rick Harkness* for the applicant; *Terry Broome* and *Robert G. Ranner* for the respondent.

DECISION OF THE BOARD; January 14, 1987

1. Terrence Broome is engaged in the drywall contracting business. In an oral decision delivered November 17, 1986, (and issued in writing November 27, 1986) in Board File No. 0697-86-R, another panel of this Board made a declaration under subsection 1(4) of the Act that Terrence W. Broome, William J. Broome, Merit Drywall & Acoustics Limited, Central Drywall & Acoustics Company and William J. Broome Ltd. constitute a single employer for the purposes of the *Labour Relations Act* ("the Act"). As a result, Terrence Broome is and at all material times was bound by the provisions of the current provincial collective agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America. The applicant is the local of the United Brotherhood of Carpenters & Joiners of America with jurisdiction over drywall and acoustic work in a geographic area which includes the City of London. This proceeding is a referral to arbitration under section 124 of the Act of a grievance that Terrence Broome breached that collective agreement by performing acoustic and drywall work on projects in the industrial, commercial and institutional ("ICI") sector of

the construction industry without obtaining his workers on those projects from the applicant's hiring hall.

2. When this referral came on for hearing December 17, 1986, counsel for Mr. Broome sought an adjournment. He said Mr. Broome had only the previous day raised the funds necessary to properly retain him and that he had not had an opportunity to prepare. He complained that neither he nor his client had been provided with a copy of the collective agreement on which the grievance was based, despite the requirement in Form 104, the document by which a referral under section 124 is initiated, that a copy of the collective agreement be appended to it when filed with the Board. He acknowledged that neither he nor his client had asked for a copy of the collective agreement during the previous proceedings, at the meeting convened by a labour relations officer after this referral was filed in an attempt to settle the matter or at any other time prior to the morning of the hearing.

3. Counsel for the applicant noted that Mr. Broome's counsel had acted for him in the November proceedings which had resulted in the single employer declaration (hereafter referred to as "the subsection 1(4) proceedings"). He said that all but one of the projects in respect of which the applicant claimed damages were projects described by Mr. Broome in his testimony in those proceedings. Counsel for the applicant was prepared to (and later did) withdraw the applicant's claim with respect to that one project (involving a contract with Z Realty to perform work at a strip mall on Highway 135) from these proceedings (without prejudice to a fresh grievance and referral with respect thereto) if counsel for the respondent was not prepared to deal with it, but argued that the respondent ought to be prepared to deal with his obligations in respect of the work to which he had referred in the earlier proceedings. As for the collective agreement, counsel acknowledged that the applicant had not appended a copy to the referral. He submitted that it was not the practice of union counsel to append copies of provincial collective agreements to every referral thereunder, as that this would result in the Board's having boxes full of copies of those agreements and it was not imagined that this would be of assistance to the Board. If the failure to file one was a defect, he argued, it was a technical defect which the Board could ignore.

4. The filing of a copy of the collective agreement with the referral is not a statutory prerequisite to jurisdiction; it is a procedural requirement of the Board's Rules of Procedure and Forms promulgated therewith. The applicable rules and forms also require that the respondent file a reply and, with it, a copy of the relevant collective agreement -- requirements with which this respondent did not comply. The Board's Rules of Procedure do not contemplate the Board's forwarding to either party a copy of the collective agreement filed by the other, and the Board does not do so. The applicant's failure to file a copy of the collective agreement with its referral, therefore, had no effect on the respondent. We therefore gave the following oral ruling:

We are satisfied that we do have jurisdiction to proceed, notwithstanding that the union did not file a copy of the provincial agreement with its referral. The respondent had not before today requested a copy of the collective agreement or of any other document on which the applicant relies and, having failed to so ask, should not now be given an adjournment on the ground that he did not receive a copy of the collective agreement until this morning, when he first asked for it.

The Board's approach to requests for adjournment is well known. As the Board noted in *Osgood Floor Coverings Limited*, [1983] OLRB Rep. June 936:

5. The Board's general policy with respect to adjournments was capsulized in the *Nick*

Masney case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, 70 CLLC ¶14,024) where the Board stated:

“...the Board’s decision to deny the respondent’s request for an adjournment was based on the Board’s practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party, i.e., where it is proven that a witness essential to the party’s case is unable to attend because of a serious illness...”

In line with this general practice, the Board in the *WEB Offset Publications Limited* case [1978] OLRB Rep. Nov. 1052, indicated that if a party’s first choice of counsel is not available to act on a date set for a hearing, that party is expected to retain other counsel who is available to act.

6. Because of the fluctuating nature of employment in the construction industry, the time required for “normal” arbitration procedures often results in those procedures being unsuitable. In the result, prior to the enactment of what is now section 124 of the Act it was not unusual for parties to engage in “self-help” remedies in response to alleged violations of collective agreements. Through the enactment of section 124 the Legislature sought to remedy this situation by providing for the arbitration of construction industry grievances by this Board and by requiring that grievances be listed for hearing within fourteen days of being referred to the Board. These considerations strongly weigh against any departure from the Board’s general adjournment practice when dealing with section 124 grievance referrals.

We propose to commence hearing the applicant’s case. If any aspect of that case genuinely catches the respondent by surprise, the question of an adjournment may be raised again at that point.

We note there was no subsequent claim that any aspect of the applicant’s case caught the respondent by surprise (other than the aspect which, as we noted earlier, the applicant withdrew without prejudice), and there was no further request for adjournment.

5. The applicant called one witness: Richard Harkness. Mr. Harkness has been the applicant’s business representative for six years. He did drywall and acoustic work as a journeyman for 10 years before that. As business representative, Mr. Harkness runs the applicant’s hiring hall and personally deals with all employer requests for referral of workers pursuant to the terms of the provincial collective agreement. He testified that there had been no such requests from the respondent, or from any of the other entities to which the Board’s single employer declaration applies, in the relevant period: since June 1986. He also testified that there were always a number of union members unemployed during the relevant period.

6. Mr. Harkness was present throughout the subsection 1(4) proceedings. He made notes of the evidence Terrence Broome gave in those proceedings about the nature and contract price of drywall and acoustic projects he performed during the relevant period, and he kept copies of the documents filed by Broome with respect to those projects. Thirteen of those projects involved work within the applicant’s territorial jurisdiction in the ICI sector to which the provincial collective agreement applies. Mr. Harkness had only seen two of these projects himself: a job at a new branch of Canada Trust in London and a job at London City Hall. Based on his experience in working with the tools and his experience as a business representative, Mr. Harkness estimated that the Canada Trust project would have required four 40 hour weeks’ work by three or four journeymen and that the City Hall project would have required two to three 40 hour weeks’ work by two journeymen and an apprentice. \$21.82 is the total amount payable per hour to or on behalf of

a journeyman for wages and benefits under the collective agreement from and after June 9, 1986. \$7.30 is the corresponding hourly amount for a first year apprentice.

7. In the course of his evidence in chief with respect to the labour involved in the Canada Trust project, Mr. Harkness observed that, as a rule of thumb, half of the contract price on drywall and acoustic jobs represented the cost of labour. The application of the union rate to the hours Mr. Harkness estimated on that project results in a labour cost greater than 50% of the respondent's contract price. Anticipating a possible attack on that basis, applicant's counsel's examination in chief entered upon a review of the individual items in the detailed written estimate the respondent had prepared when bidding on the Canada Trust project. He began by inviting his witness to comment on the figure of \$2.00 per foot used by Broome in making his estimate with respect to suspended drywall ceilings. Mr. Harkness prefaced his answer by saying that he was not an estimator, then began "but on the basis of people I've spoken to ...". At that point, counsel for the respondent objected on two grounds: that the Board should not receive expert evidence from a non-expert in this hearsay manner and that the Board should not receive hearsay evidence about Mr. Broome's testimony in the previous proceedings. We declined to entertain testimony about what unnamed persons had to say about such detailed matters of cost estimating, particularly when presented only in anticipation of a possible defence. Although it was not particularly germane to the question objected to, we also dealt with counsel's second ground of objection, ruling that we would indeed entertain the applicant's evidence about what the respondent himself had said in the subsection 1(4) proceedings about matters relevant to this proceeding.

8. With respect to the 11 other ICI projects among those to which Mr. Broome had referred in his testimony in the subsection 1(4) proceedings, Mr. Harkness had noted the contract prices revealed by Broome in that testimony. On his recital before us, those contract prices totalled \$58,800.00. As we noted earlier, Mr. Harkness had not personally inspected the sites of these projects and, therefore, could not say from inspection and experience what number of hours of labour would be required to perform them. Mr. Harkness returned to his earlier observation that one-half of the price of a job generally represents the cost of labour. Counsel for the respondent objected to our receiving that statement in evidence, arguing that this was a matter for the expertise of an estimator, which Mr. Harkness had earlier admitted he was not. Mr. Harkness had testified, however, that there had been a period during which employers bound to the provincial agreement in the London area could obtain a reduction of the wage payable on a project under certain conditions. Those conditions included a requirement that the employer reveal its contract price for the project to Mr. Harkness on behalf of the union. As a result of the operation of that arrangement and his dispatching of workers to projects which satisfied the necessary conditions, Mr. Harkness would have gained some appreciation for the relationship between contract price and layout cost, even though he would not have acquired an estimator's expertise with respect to the individual elements which went into contractors' bids, like the cost per foot of suspended drywall ceiling. Based on that appreciation, his experience in dealing with contractors as business representative on the wage roll-back arrangement and other matters and his general experience in the industry, we were not prepared to rule that Mr. Harkness' evidence on this point should and would be given no weight whatsoever, and so advised the parties.

9. When counsel for the respondent pursued the basis of the one-half labour cost rule of thumb in cross-examination, Mr. Harkness testified that he had once suggested to William J. Broome that labour cost typically represented one-third of the contract price and that William J. Broome had retorted that one-half was the correct figure. William J. Broome is one of the persons who, together with the respondent, were declared to constitute a single employer for the purposes of the Act. It is apparent from the reasons of the panel that granted that declaration that William J. Broome (the respondent's father) was an active participant in the business of Terrence Broome,

which that panel regarded as the continuation, in a different guise, of a family drywall contracting business which, in its various manifestations, had involved William J. Broome for some time. Having elicited evidence of it, counsel for the respondent did not cross-examine Mr. Harkness with respect to this conversation with William J. Broome.

10. Terrence Broome was present throughout our hearing. At one point during Mr. Harkness' recital of the nature and contract price of each project about which Mr. Broome had testified in the subsection 1(4) proceedings, in the hope of narrowing the issues and discovering the basis of opposition to the grievance, we invited both parties to set out in writing their positions on the hours of labour involved in each of the projects in question. While the union responded, the respondent declined the invitation. He was not prepared to admit in these proceedings that any number of hours of work had been expended on any project. Rather than delay the proceedings by insisting on a detailed pleading of the parties' positions, we directed that the applicant complete the presentation of its case, which it did. Mr. Broome did not then testify. His counsel called no witnesses. He argued that there was no evidentiary basis on which we could award damages for breach of the collective agreement. His major arguments were that we could not rely on the one-half rule of thumb, that the union's estimate failed to take into account the possibility that Broome himself had performed part of the work and that there was no admissible evidence that any work had been performed under the contracts in question.

11. Dealing with the last point first, we note that Mr. Harkness did say that Broome's testimony in the subsection 1(4) proceedings had covered contracts then in progress as well as contracts which had been completed at the time of that testimony. He also said Broome's testimony covered residential projects as well as projects in the ICI sector. With respect to those projects in respect of which damages are claimed, counsel's questions in chief and the answers given were in terms of work done, not contracts obtained. With respect to the projects to which he referred in his testimony, it was not put to Mr. Harkness in cross-examination that Mr. Broome had been testifying about incomplete jobs or that any of the jobs was, in fact, incomplete. When he had the opportunity in these proceedings to explain or contradict it or correct any misstatement Mr. Harkness may have made of it, we fail to see how the respondent can complain about our acting on evidence of what he said under oath in another proceeding before the Board.

12. As for the possibility of Broome's having performed some of the work himself, that possibility was not put to Mr. Harkness in cross-examination and we therefore have no evidence at all as to the probability that this could have occurred. The respondent could have put such evidence before us, but chose to remain silent. In those circumstances, we see no reason to weigh that factor in our assessment of damages.

13. We are prepared to act on the rule of thumb espoused by Mr. Harkness, as its bases include both his personal experience and an assertion by a principal of the single employer of which the respondent is a constituent part. The respondent had the opportunity to say what hours of work had been performed on the projects in question. He chose not to take that opportunity. While the onus of proof rests on the applicant, in matters in which a respondent may be expected to have the most direct, personal and easily accessed knowledge of a matter in issue it may not take a great deal from the applicant to shift the burden of adducing evidence to the respondent. Starting with the proposition that labour cost is about one half of contract price on projects of the sort under consideration, we note that one-half of the contract price will be a conservative estimate of damages if the respondent prepared his bids on the basis of, and paid, an hourly labour cost which was less than that imposed by the collective agreement.

14. We find that the respondent breached the collective agreement by which he was bound

by failing to employ workers obtained from the applicant's hiring hall on the aforementioned projects. We are satisfied that this resulted in a loss of earnings for union members who were unemployed at the time these projects were performed. With respect to the Canada Trust job, we find that the loss amounts to \$10,910.00, representing 500 hours of work at \$21.82 per hour. With respect to the London City Hall job, we find that the loss amounts to \$5,100.00, representing 200 hours of work at \$21.82 per hour plus 100 hours of work at \$7.30 per hour, rounded to the nearest \$10.00. With respect to the 11 other projects whose contract prices totalled \$58,800.00 we find that the loss amounts to \$29,400.00. In accordance with the principles referred to in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 48 D.L.R. (3d) 191 (Ont. Div. Ct.) and (1976), 57 D.L.R. (3d) 199 (Ont. C.A.), we direct that the respondent forthwith pay the sum of \$45,410.00 to the applicant in trust for distribution to and on behalf of the affected parties who were denied an opportunity to work on the 13 jobs in question.

0812-86-R Ontario Catholic Occasional Teachers' Association, Applicant, v. Carleton Roman Catholic Separate School Board, Respondent

Bargaining Unit - Certification - Whether supply instructors should be put in same bargaining unit as occasional teachers - Unit consisting solely of occasional teachers appropriate

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *B. L. Armstrong* and *F. C. Burnet*.

APPEARANCES: *Susan Ursel* and *Ray Fredette* for the applicant; *Colin D. McKinnon*, *Brian Ward* and *Stephen Richardson* for the respondent.

DECISION OF THE BOARD; January 29, 1987

1. This is an application for certification. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* ("the Act"). In accordance with the direction of a differently constituted panel of the Board in a decision dated August 26, 1986, a pre-hearing representation vote was conducted by secret ballot on October 1, 1986, and the ballot boxes were sealed pending resolution of the parties' dispute over the description of the appropriate bargaining unit. The apparent nature of that dispute was described in the following paragraphs of the Board's decision of August 26, 1986:

3. The applicant claims that the unit of employees of the respondent appropriate for collective bargaining in this matter would be described as follows:

All occasional teachers employed by the respondent in its schools in the Regional Municipality of Carleton save and except those employees teaching in schools pursuant to Part XI of the Education Act and those employees in bargaining units for which any trade union holds bargaining rights as of the application date.

In its reply, the respondent describes the appropriate bargaining unit this way:

All qualified and unqualified occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton, save and except those employees teaching in schools pursuant to Part XI of the Education Act, those

employees in bargaining units for which any trade union held bargaining rights as of June 19, 1986, being the date of application, including teachers with probationary or permanent teaching contracts with the respondent.

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6. At the first glance, the parties' disagreement about the bargaining unit description concerns only the inclusion or exclusion of unqualified persons employed to perform the duties contemplated by the definition of occasional teacher in the *Education Act*. It appears, however, from the report of the Labour Relations Officer who met with representatives of the parties and from subsequent written representations filed with the Board by their counsel, that the respondent seeks the exclusion from any bargaining unit of occasional teachers of those of its employees who, in addition to their work as "occasional teachers", teach on a part-time basis pursuant to permanent or probationary teaching contracts. The applicant takes the position that such persons should fall within the appropriate unit of occasional teachers when they perform the work contemplated by the definition of "occasional teacher" in the *Education Act*. Counsel for the respondent describes the party's disagreement on this issue in the following way:

The application affects three identifiable groups:

- (a) qualified occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton;
- (b) unqualified occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton;
- (c) qualified occasional teachers who are members of another union, namely, the Ontario English Catholic Teachers' Association.

The applicant seeks to include in its proposed unit all persons included in (a) and (c) above.

The respondent seeks to include in its proposed unit all persons included in (a) and (b) above.

2. We reiterate here the observations the Board made in the August 26, 1986, decision about the phrases "occasional teacher" and "unqualified occasional teacher":

4. The employment of "teachers" by school boards is governed by several statutes, including the *Education Act*, R.S.O. 1980 c. 129, as amended. The term "occasional teacher" comes from the *Education Act*, which subsection 1(1) defines that term as follows:

- 31. "occasional teacher" means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year;

[emphasis added]

Subsection 1(1) of the *Education Act* defines the word "teacher" as follows:

- 66. "teacher" means a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or a secondary school in Ontario;

As we understand the lexicon of school board employment relations, the word "qualified" means "having the qualifications described in clause 66 of subsection 1(1) of the *Education Act*." On that view, "occasional teachers" are, by definition, "qualified" and the phrase "unqualified occasional teacher" is, strictly speaking, a contradiction in terms. It appears from the

material before us that the respondent intends the phrase “unqualified occasional teachers” to refer to unqualified persons employed on an emergency basis (pursuant to section 22 of Regulation 262, as amended) or pursuant to a letter of permission granted by the Minister of Education, whose duties involve “teaching as a substitute for a permanent, probationary or temporary teacher”.

As the Board noted in the passage just quoted, the phrase “unqualified occasional teacher” is a contradiction in terms, since anyone who can be described as an “occasional teacher” is, by definition, “qualified.” It follows that it is redundant (and, therefore, unnecessary) to refer to any “occasional teacher” as “qualified.” It is important not to lose sight of the fact that the word “teacher” has a narrow and technical definition in the statutory framework imposed on the labour relations between school boards and those who might fall within a common or dictionary definition of “teacher.” In order to maintain the necessary distinctions in what follows, unless we expressly indicate otherwise the word “teacher” will describe only those who fall within the definition of “teacher” in subsection 1(1) of the *Education Act*. A person who is not a “teacher” but is employed by the school board to “teach” in the ordinary sense will be referred to as an “instructor.” The phrase “occasional teacher” will be used to describe only those who fall within the definition of that term in subsection 1(1) of the *Education Act*. A person who does not fall within that definition but is employed to teach as a substitute for a teacher or instructor for a temporary period will be referred to as a “supply instructor.” Adopting that nomenclature, one of the two differences between the parties with respect to the composition of an appropriate bargaining unit is whether supply instructors should be put in the same bargaining unit as occasional teachers.

3. A general theme of the *Education Act* and Regulations thereunder is that those who teach in schools must be “teachers” within the meaning of that Act. There are various limited exceptions to this general rule. By way of example, subsection 9(5) of Regulation 262 under the *Education Act* provides:

(5) A board may employ a person who is not a teacher to teach in a continuing education class a course that is not to be recognized for credit provided such person holds qualifications acceptable to the board for such employment.

(It is pursuant to this exception to the general rule that instructors dealt with in the *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900 and *Metropolitan Separate School Board*, [1986] OLRB Rep. Sept. 1259, could be employed to “teach.”) The provision which permits the respondent to employ supply instructors to perform work which would ordinarily be performed by occasional teachers is found in subsection 22(1) of Regulation 262 as amended by O. Reg. 617/81, section 18:

22.-(1) Subject to subsection (2), a board may, in the case of an emergency, appoint an unqualified person to teach for not more than ten school days in a school year without obtaining a Letter of Permission under section 49 of Regulation 269 of Revised Regulations of Ontario, 1980.

Under the section of Regulation 269 referred to in the provision just quoted, the Minister of Education cannot grant a Letter of Permission authorizing employment of an unqualified person unless the position for which that person is to be employed has been advertised extensively and the school board seeking the letter establishes that no teacher has both applied for and accepted the position in question. Generally speaking, there are more teachers currently seeking full-time positions than there are positions to be filled. Consequently, Letters of Permission are quite rare. The respondent had no more than one during the last full school year.

4. The *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c. 464 (often referred to, as it will be here, as “Bill 100”) applies to labour relations between school boards and permanent and probationary teachers (as those terms are defined by the *Education Act*) who are

employed by a school board “as a teacher” in the ordinary sense. The *Labour Relations Act* does not apply to teachers covered by Bill 100. Bill 100 assigns bargaining rights for such teachers to branches of the affiliates of the Ontario Teachers’ Federation. In the case of teachers in separate schools (other than those teaching in schools pursuant to Part XI of the *Education Act*), the relevant affiliate is the Ontario English Catholic Teachers Association (“OECTA”).

5. Bill 100 does not apply to occasional teachers, even though they are teachers in the technical sense who are employed “as a teacher” in the ordinary sense. As the Board noted in *Board of Education for the City of York*, [1985] OLRB Rep. May 767 at paragraph 5:

...Bill 100 does not apply to all teachers. Occasionals have been excluded, and, by default fall under the *Labour Relations Act*. It is not clear why they were omitted. There is no indication that the Legislature ever turned its mind to their situation.

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8. It may well be (as the Matthews Commission suggests) that the *Labour Relations Act* is not suitable for the public education sector. But for occasionals, it is their only alternative. Although they are qualified teachers they are not included in the bargaining system which covers their professional peers. By default, they fall within the ambit of the *Labour Relations Act*. This creates something of an anomaly. It would be much simpler if one could say that all qualified teachers employed to teach are covered by the general legislation governing teacher collective bargaining. But that is not the case....

Bill 100 also does not apply to instructors who, while they are not teachers in the technical sense, are employed “as a teacher” in the ordinary sense.

6. Like other school boards, the respondent is already party to several collective bargaining relationships. Under Bill 100, its permanent and probationary teachers are represented in collective bargaining by branch affiliates of the Ontario English Catholic Teachers’ Association (“OECTA”) and L’Association des Enseignants Franco - Ontariens. As a result of voluntary recognition, a local of the Canadian Union of Public Employees represents a unit of secretaries and office staff employed in the schools themselves. The Carleton Roman Catholic Separate School Board Employees’ Association represents a unit of plant, maintenance and transportation employees and a separate unit of office and clerical employees limited (as a result of the earlier voluntary recognition of the CUPE local) to employees at its administrative offices. Employees not currently represented by a trade union in collective bargaining include teacher aides, para-professionals (that is: development assistants, developmental specialists, psychologists, psycho-educational consultants and social workers), lunch hour supervisors, occasional teachers and instructors. We use the last category to describe both supply instructors and any other employees who may be “teachers” in the ordinary sense without being a “teacher” within the definition of the *Education Act*. Some of the respondent’s Heritage Language Instructors and Itinerant Music Instructors may fall within this category, as would anyone employed to teach pursuant to a Letter of Permission.

7. The respondent serves a large geographic area outside and surrounding the City of Ottawa. Each of its schools’ principals maintains his or her own lists of persons who have indicated a willingness to serve as occasional teachers or supply instructors. The principal attempts to find an occasional teacher to substitute for temporarily absent regular teacher before turning to the list of supply instructors. Many teachers who have indicated a willingness to work as an occasional teacher for this school board have also placed their names on similar lists with the Carleton Board of Education and the school boards in the City of Ottawa. The respondent’s experience is that such persons prefer teaching assignments with the city boards, when they are available. Accordingly, there are occasions, particularly in the winter months, when an occasional teacher cannot be found as a substitute for a temporarily absent regular teacher (particularly a teacher of French, Industrial

Arts or Music) and the school principal must turn to his or her list of supply instructors to fill the temporary vacancy. The respondent's rough estimate is that twenty percent of those on its lists of persons available to substitute for teachers are supply instructors rather than occasional teachers, and that fifteen to twenty percent of the number of days worked by such substitutes are worked by supply teachers. The applicant suggests that the respondent's estimate of days worked by supply instructors is numerically impossible if the respondent is abiding by the ten day restriction in subsection 22(1) of Regulation 262. On the view we take, nothing turns on whether supply instructors perform a smaller percentage of the substitutional teaching than the respondent claims.

8. Subject to the restrictions in the Regulations under the *Education Act* on the length of time they can remain employed, the work supply instructors do is similar in nature to work done by occasional teachers, in the sense that the temporary vacancy a supply instructor is engaged to fill would have been filled by an occasional teacher if one had been available. The respondent's occasional teachers and supply instructors are paid by the hour. The hourly rate paid to a supply instructor is somewhat less than that paid to an occasional teacher. The respondent put some emphasis on the fact that the Teachers' Superannuation Commission had recently advised it to make the same remissions to the Teachers' Superannuation Fund with respect to supply instructors as it always has for occasional teachers, apparently on the view that when supply instructors are employed under subsection 22(1) of Regulation 262 "the Ontario Government deems them to be qualified for up to 10 days." Counsel does not ask us to accept the Commission's legal conclusion. If he thought the argument was supportable, he would not have been concerned to have us say that "unqualified" persons must be included in the subject unit. The only significance for this case of that Commission's views is that they result in the respondent's making similar deductions and remissions for both groups of employees for the time being.

9. Of the teachers who have indicated to this respondent that they are available to work as occasional teachers, many wish to be employed full-time as permanent teachers but are not so employed or are only so employed on a part-time basis. Many of the teachers hired to fill permanent and probationary positions in the respondent's school system are teachers whose names previously appeared on its list of teachers available to work as occasional teachers. Employment as an occasional teacher is seen as a route to part-time or full-time employment as a permanent or probationary teacher - employment which would then be subject to collective bargaining under Bill 100 and not the *Labour Relations Act*. Supply instructors have no prospect of part-time or full-time teaching employment on a permanent basis, and the extent to which they can be so employed on a temporary basis is extremely limited.

10. Referring to the tests outlined in the often cited decisions in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 and *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, counsel for the respondent says all of the factors listed in *Usarco* under the heading "community of interest" would favour joining occasional teachers and supply instructors in one bargaining unit. Counsel for the applicant argues that the community of interest of occasional teachers is very substantially different from that of supply instructors, because of the very significant legislative and regulatory restrictions on the employment of unqualified persons in a teaching capacity.

11. The respondent made reference to the collective bargaining relationships which the Carleton Board of Education (which operates the public school system in the same geographic area as the respondent) has with the Ontario Secondary School Teachers' Federation ("OSSTF" - which represents occasional teachers in that board's secondary schools) and the Ontario Public School Teachers' Federation ("OPSTF" - which represents occasional teachers employed by the board in its elementary panel). The respondent suggested that supply instructors were included in the unit for which OPSTF was certified. This was based on a belief by the respondent that the

names of such persons appeared on voters' lists prepared for the representation vote held in connection with OPSTF's application for certification. If the parties to those proceedings included on the voters' lists names of persons who did not have the qualifications of an occasional teacher, from our review of the Board's file in that proceeding it does not appear that the Board was or could have been aware of it. It is clear from the Board's decisions in that matter that the bargaining unit it had in mind was limited to occasional teachers.

12. Counsel also draws our attention to the language of Article 13.07 of what he understands to be the current collective agreement between the Carleton Board of Education and OSSTF, which reads:

13.07 Casual occasional teachers who do not have an Ontario Teaching Certificate or its equivalent shall be paid for each day of employment at the rate of 75% of the rate as established in Article 13.06 above.

By this language, counsel argued, the parties to that collective agreement have agreed that the phrase "occasional teacher" can be used to describe unqualified persons. It is noteworthy, however, that the collective agreement in question contains a definition of occasional teacher in Article 3.02, which reads:

3.02 An Occasional Teacher is as defined by the *Education Act*.

Read together, these two articles reveal a certain unclarity of thought on the part of those who drafted and adopted that collective agreement. It is not apparent whether the parties to that agreement intended to extend the union's bargaining rights beyond the occasional teachers for which it was certified to include supply instructors, or merely to place limits on the terms on which employees outside the unit could be employed to perform bargaining unit work.

13. The experience of Mr. Fredette, the applicant's organizer, was put before us. At the time the parties' evidence and argument on these issues were received, the applicant had been certified to represent 11 units of occasional teachers and had concluded collective agreements covering 4 of those units. The argument that supply instructors should be included in the unit was only raised at the certification stage in one case: *Windsor Roman Catholic Separate School Board, infra*, in which the argument was rejected without being specifically referred to in the Board's written decision. The question of the treatment of supply instructors arose during the negotiations of one of the four concluded collective agreements. In that case, the union was asked whether union dues should be deducted from the amounts paid to supply instructors; the union said yes. The union's position, however, is that supply instructors are not part of the bargaining unit covered by that collective agreement.

14. In matters involving the employment of persons to perform a teaching function, the legislature has chosen to make statutorily defined qualifications determinative not only of the work which those persons may perform but also of the collective bargaining regime by which their employment may be governed. The legislature thought it important that collective bargaining for teachers be governed by legislation quite different from the *Labour Relations Act*. It is not apparent why teachers whose employment is 'casual' were excluded from the collective bargaining regime governing teachers whose employment is 'permanent.' Except in a narrow range of employment situations (seasonal employment in the tobacco and canning industries) the characteristics of which are not shared by occasional teacher employment, this Board has consistently rejected the notion that "casual" workers should be excluded from units of "permanent" workers: *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713; *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371. The fact remains, however, that

occasional teachers are not covered by Bill 100, and collective bargaining for them falls, by default, under the *Labour Relations Act*.

15. The application to occasional teachers of the *Labour Relations Act* and of the Board's jurisprudence has been influenced by the "casual" nature of their employment and their very strong affinity with their professional colleagues in Bill 100 units. The Board commented on this in *Metropolitan Separate School Board, supra*, at paragraph 25:

25. The first occasion on which this Board had to consider the applicability of its general practices, procedures and doctrines to a certification application affecting occasional teachers was in *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Mar. 466. One of the issues in that case was whether the Board would apply its "30-30" rule to determine which persons were "employed" in the occasional teacher bargaining unit at relevant times. It concluded it would. The Board rejected that conclusion and adopted a special test for occasional teachers in *Board of Education for the City of York*, [1985] OLRB Rep. May 767, which was the next decision to address that question. As will be apparent from that decision and from the passage quoted earlier from *Board of Education for the Borough of Scarborough, supra*, occasional teachers are not a group which would have been excluded from a unit of certified teachers if it had fallen to this Board to define such a unit in accordance with the principles it has developed over the years. This observation is not made as part of a critique of Bill 100, but simply to highlight a fact peculiar to the "education industry", the ramifications of which have led the Board to adopt a different approach to matters involving occasional teachers. In the same vein, it is noteworthy that the Board's approach to appropriate composition of occasional teacher bargaining units has been so influenced by the peculiarities of Bill 100 as to have results which would not occur in another industry - such as the definition of units in terms of the language in which employees work, for example: see, *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090.

Since its decision in the *Board of Education for the City of Toronto*, [1983] OLRB Rep. March 466, the Board has dealt with dozens of applications for certification for units consisting solely of occasional teachers. It has consistently found such units to be appropriate for collective bargaining. The reasons for this were briefly stated in the Board's decision in *Windsor Roman Catholic Separate School Board*, [1986] OLRB Rep. July 1028 at paragraph 6:

...

It has been the Board's experience that until relatively recently school boards and unions that represent their non-teacher employees have not thought of occasional teachers as employees who might be the subject of or affected by collective bargaining under the *Labour Relations Act*. When they have been the subject of trade union organizing, they have been organized separately from other employee groups. Because of their affinity with "Bill 100" teachers, the Board has placed them in separate bargaining units -- if effect, "tag ends" to Bill 100 units

16. Certification applications with respect to instructors are even more recent phenomena than applications with respect to occasional teachers. Composition of units of instructors has been addressed in two decisions: *The Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900; and, *Metropolitan Separate School Board, supra*. In both cases, units of the respondents' occasional teachers had been the subject of certification before applications were brought with respect to instructors. Although those decisions did not speak directly to the situation of instructors who substitute for Bill 100 teachers, such persons were included with all other instructors in the unit established in *Metropolitan Separate School Board*. All instructors fall within the *Labour Relations Act*, and it would be inconsistent with this Board's jurisprudence to separate supply instructors from other instructors in composing bargaining units.

17. The immediate question here is not whether one unit consisting of occasional teachers and supply instructors (or occasional teachers and instructors) would be appropriate. The question is whether a unit consisting solely of occasional teachers would be appropriate. Although basic

terms and conditions of employment of occasional teachers and supply instructors are similar, their employment aspirations and potential for longer term attachment to the workplace are very different, because of the distinctions made by the *Education Act* and Regulations thereunder. The impact of those distinctions on the employment relationships and the aspirations of the groups concerned supports a conclusion that each group has a different and distinct community of interest. Added to that consideration is the consideration articulated by the Board in *The Carleton Board of Education*, Board File No. 0534-85-R, dated July 16, 1985, unreported, with respect to a somewhat different issue:

In structuring its organizing campaign, the applicant ... was entitled to take into consideration the Board's decisions in the *Board of Education for the City of Toronto* and in other cases involving occasional teachers, in determining who it should seek to organize. Since members of the labour relations community do take such decisions into account in ordering their affairs, the Board should not likely adopt an inconsistent approach in relation to such matters.

The Board's uniform practice since its decision in *Board of Education for the City of Toronto*, [1983] OLRB Rep. Mar. 466, has been to treat occasional teachers as constituting an appropriate bargaining unit by themselves. This applicant has relied on that practice, and we see no reason in this case to depart from that practice. The fact that parties to another collective bargaining relationship may have agreed that supply instructors ought to be included with occasional teachers in a bargaining unit is an insufficient basis on which to depart from that past practice. If it were shown that the addition of supply instructors to units of occasional teachers by voluntary recognition had become a regular practice in the education sector, a reappraisal of this practice might be warranted.

18. Accordingly, the bargaining unit in this application will include only occasional teachers as that term is defined by the *Education Act*. In rejecting the argument that supply instructors should be included in this unit, we should not be taken as suggesting that they would form an appropriate bargaining unit by themselves, nor does our decision mean (as the respondent's management apparently feared) that it can no longer employ supply instructors in circumstances in which it would otherwise be lawful to do so.

19. The customary description of an occasional teacher bargaining unit expressly excludes "employees in bargaining units for which any trade union held bargaining rights as of [the application date.]" That language was originally adopted to satisfy concerns that school boards had about making distinctions between occasional teachers and teachers covered by Bill 100. Strictly speaking, this exclusionary language is unnecessary for that purpose, since "occasional teachers" are not "teachers" as that term is currently defined in Bill 100. It is important to remember, however, that that exclusion (whether by express language or by operation of Bill 100 and subparagraph 2(f) of the *Labour Relations Act*) only applies to a teacher in respect of employment which falls within the scope of Bill 100. In respect of employment to teach as a substitute for a permanent, probationary or temporary teacher in the circumstances described in clause 1(1)31 of the *Education Act*, a teacher is an occasional teacher and falls within the customary occasional teacher bargaining unit description even if, during other hours of the week, he or she is engaged by the same school board in employment which falls within the scope of Bill 100.

20. The respondent employs some teachers under part-time permanent or probationary teacher contracts. When performing the duties contemplated by those contracts, those teachers fall within Bill 100 and are covered by the agreements negotiated with OECTA and AEFO. A number of those part-time "contract" teachers have indicated a willingness to perform, and from time to time do perform, occasional teacher assignments. They do not fall within Bill 100 with respect to that additional employment; they are "occasional teachers" within the meaning of the *Education*

Act when they perform that work. In respect of that work, they would be governed by the terms of any collective agreement negotiated to cover a bargaining unit framed in the usual terms.

21. The respondent argued that a teacher covered by Bill 100 and obliged to a member of OECTA will be placed in a conflict of interest situation if he or she is subject to a collective agreement governing his or her performance of occasional teacher assignments. Counsel for the respondent said occasional teachers may be called upon to replace permanent teachers when the latter engage in a legal strike under Bill 100. He raised the spectre of an OECTA member being obliged to cross a picket line of his or her fellow members in order to perform such an occasional teacher assignment. This is an intriguing hypothetical situation, and is another reason to wonder why the legislature excluded occasional teachers from Bill 100. They are excluded, however. If the respondent's concern is that this hypothetical teacher might be inclined to join in a concerted refusal to perform an occasional teacher assignment to which he or she is otherwise legally committed, it is hard to see how excluding individuals of that sort from a bargaining unit of occasional teachers would change the result, either pragmatically or legally. Pragmatically, it is not membership in the bargaining unit of occasional teachers which is likely to determine whether this hypothetical individual crosses or refuses to cross the picket line. Legally, if he or she has an obligation to work as an occasional teacher, the prohibition in the *Labour Relations Act* against concerted refusals to work will apply to him or her equally whether he or she is excluded from the occasional teacher bargaining unit or not, with this one exception: if included in the occasional teacher bargaining unit, this hypothetical individual has at least some prospect that the timing of the collective bargaining process in the occasional teacher unit can be arranged to coincide with that of the corresponding unit of Bill 100 teachers, so that strikes in both units are lawful at the same time.

22. The perspective that we would be doing employees a favour by excluding them from collective bargaining altogether in respect of certain employment is not one which the Board is ordinarily inclined to adopt, and we are not persuaded to adopt it here. In respect of their employment as occasional teachers, those employed by the respondent in other capacities at other times should enjoy the same access to collective bargaining and form part of the same bargaining unit as those who do not have any other employment with the respondent.

23. On November 26, 1986, we ruled orally that the bargaining unit appropriate for collective bargaining in this application is described as follows:

all occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton, save and except those employees teaching in schools pursuant to Part XI of the *Education Act*, and employees in any bargaining unit for which a trade union held bargaining rights as of June 19, 1986.

For the purpose of clarity, the term "occasional teacher" in this description of the voting constituency has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980 a. 129, as amended.

As that was the voting constituency in which the pre-hearing representation vote had been conducted, we directed that the ballot box be unsealed and the ballots counted. The ballots have since been counted. Notice of the report of the Returning Officer on the counting of the ballots was given in accordance with the Board's Rules of Procedure, and no statement of desire to make representations has been filed by any interested person within the time fixed under subsection 3 of section 70 of the Board's Rules of Procedure.

24. The Board is satisfied that not less than thirty-five percent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

25. On the taking of the pre-hearing representation vote, more than fifty percent of the ballots cast were cast in favour of the applicant.

26. A certificate will issue to the applicant.

27. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

2446-86-R; 2447-86-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant, v. **Caterpillar of Canada Ltd.**, Respondent, v. Group of Employees, Objectors; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant, v. Caterpillar of Canada Ltd., Respondent

Certification - Practice and Procedure - One-third of possible bargaining unit employees in dispute - Dispute not affecting applicant's right to certification - Whether interim certificate should issue - Question depends on whether collective bargaining can be meaningful

BEFORE: *Judith McCormack*, Vice-Chairman, and Board Members *R. J. Gallivan* and *H. Peacock*.

APPEARANCES: *H. Powers* and *Clare Meneghini* for the applicant; *Daniel J. Shields*, *Jerry Brust*, *David McKie*, *George Baird* and *John Lyons* for the respondent; *Frank Ietswaard*, *Reginald R. Skrepnek*, *Tom J. Christie*, *John Sato*, *Mike Pantaleo*, *Angelo Potkidis*, *Romas Povilonis*, *Zdenek Kovarik* and *James Young* for the objectors.

DECISION OF JUDITH McCORMACK, VICE-CHAIRMAN AND BOARD MEMBER H. PEACOCK; January 13, 1987

1. These are two applications for certification which were consolidated for hearing upon the agreement of the parties.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The parties were able to agree on a partial description of the bargaining unit. However, they were in dispute with respect to other aspects of the bargaining unit which could not be resolved without a determination as to whether a number of individuals should be excluded from the bargaining unit either on the basis that they were not employees within the meaning of section 1(3)(b) of the *Labour Relations Act*, or on the basis that they did not share a community of interest with bargaining unit employees. The Board therefore found the following partial description to be a unit of employees appropriate for collective bargaining, pending the resolution of that dispute:

All office, clerical and technical employees of the respondent in Mississauga and Brampton, save and except supervisors, persons above the rank of

supervisor, accountants, staff auditors, students employed during the school vacation period and students engaged in a cooperative learning programme.

4. The Board also notes that the parties have agreed that the secretary to the President, the secretary to the Employment Relations Manager, and the industrial nurses should be excluded from the bargaining unit. They are not so described at this time as each may fall into a broader category of employees whose inclusion or exclusion in the bargaining unit is currently in dispute.

5. In accordance with the Rules of Practice respecting applications for certification, the respondent employer has filed a list of employees in the bargaining unit, together with specimen signatures for the employees on the list. After the parties were given an opportunity to review the list, the Board was advised that the parties were in dispute with respect to the inclusion of the following employees in the bargaining unit:

- a) D. Russo, accounting analyst was challenged by the respondent on the basis that s/he is employed in a confidential capacity in matters relating to labour relations;
- b) M. M. Hamilton, J. I. Morin and H. Decloe, foremen/planners, were challenged by the respondent on the basis that they exercise managerial functions, were employed in a confidential capacity in matters relating to labour relations and/or they do not share a community of interest with other employees in the bargaining unit;
- c) R. J. Povilonis and M. Gorup, designers, were challenged by the respondent on the basis that they were employed in a confidential capacity in matters relating to labour relations and/or they do not share a community of interest with other employees in the bargaining unit;
- d) B. Leardi, secretary to the Corporation and controller, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- e) J. M. McLearin, secretary to the parts district manager, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- f) B. D. Collins, secretary to quality control and engineering, was challenged on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- g) C.P. Lee, secretary to the manufacturing and technical services manager, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- h) F. Mancini, secretary to the materials and purchasing manager, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- i) C.D. Stafford, D.J. Arnold, R.E. Bristow, J.J. Christie and J. Sato, material engineers, were challenged by the respondent on the basis that they exercise managerial functions, were employed in a confidential

capacity in matters relating to labour relations and/or they did not share a community of interest with other bargaining unit employees;

- j) W.H. Twaddle and D.S. Rihal, senior quality engineers, were challenged by the respondent on the basis that they exercise managerial functions, were employed in a confidential capacity in matters relating to labour relations and/or they did not share a community of interest with other bargaining unit employees;
- k) W.A. Graham, A.B. Keatt, F. Leonard and J. Young, planning staff engineers, were challenged by the respondent on the basis that they exercise managerial functions, were employed in a confidential capacity in matters relating to labour relations and/or they did not share a community of interest with other bargaining unit employees;
- l) D. King and G. Newman, staff engineers, were challenged by the respondent on the basis that they exercise managerial functions, were employed in a confidential capacity in matters relating to labour relations and/or they did not share a community of interest with other bargaining unit employees;
- m) Z. Kobariak, manufacturing project engineer, was challenged by the respondent on the basis that s/he exercises managerial functions, was employed in a confidential capacity in matters relating to labour relations and/or s/he did not share a community of interest with other bargaining unit employees;
- n) G.R. Lindley and M. Pantaleo, manufacturing system engineers, were challenged by the respondent on the basis that they exercise managerial functions, were employed in a confidential capacity in matters relating to labour relations and/or they did not share a community of interest with other employees;
- o) W.M. Parker, senior manufacturing and system engineer, was challenged by the respondent on the basis that s/he exercises managerial functions, was employed in a confidential capacity in matters relating to labour relations and/or s/he did not share a community of interest with other bargaining unit employees;
- p) G.W. Draper, E.L. Gabriel, F. H. Ietswaard, D.J. Payne and A.M. Ross, systems analysts, were challenged by the respondent on the basis that they were employed in a confidential capacity in matters relating to labour relations and/or they did not share a community of interest with other bargaining unit employees;
- q) S.J. Gill and J.M. Psaila, programme analysts, were challenged by the respondent on the basis that they were employed in a confidential capacity in matters relating to labour relations and/or they did not share a community of interest with other bargaining unit employees;
- r) C.A. Bunn, systems programmer, was challenged by the respondent on

the basis that s/he was employed in a confidential capacity in matters relating to labour relations;

- s) S.F. LaFord, B. McCaluey and L. Speziale, computer systems operators, were challenged by the respondent on the basis that they were employed in a confidential capacity in matters relating to labour relations;
- t) D.M. Serjeant, secretary to the data processing manager, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- u) E.T. Spalding, computer schedule clerk, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- v) J. Monardo and E.I. Whyte, data entry operators, were challenged by the respondent on the basis that they were employed in a confidential capacity in matters relating to labour relations;
- w) J. Renco, safety inspector, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- x) J.M. Boles, G.W. Caines and E. Antidorni, production account clerks, were challenged by the respondent on the basis that they were employed in a confidential capacity in matters relating to labour relations;
- y) D. Fraser, payroll account clerk, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- z) M. Haines, payroll control analyst, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- aa) J. Reid, factory reporting analyst, was challenged by the respondent on the basis that s/he was employed in a confidential capacity in matters relating to labour relations;
- bb) P.R. Davis and J.C. Pitfield, buyers, were challenged by the respondent on the basis that they exercised managerial functions, were employed in a capacity confidential to labour relations, and/or they did not share a community of interest with other bargaining unit employees;
- cc) D.J. D'Cruz, assistant buyer, was challenged by the respondent on the basis that s/he exercised managerial functions, was employed in a capacity confidential to labour relations and/or did not share a community of interest with other bargaining unit employees.

6. Both parties requested that a Board Officer be appointed to inquire into and report back to the Board on these matters.

7. The Board expressed some concern to the parties that the exclusions asserted by the

respondent were unusually broad in relation to the Board's jurisprudence, and that the normal examination process would be very costly and time-consuming as a result. Rather than appointing a Board Officer at this time, we advised the parties that a Board Officer would be made available to them on January 16, 1987, to assist them in attempting to reduce the number of individuals whose inclusion in the bargaining unit was in dispute. The Board will then consider what further steps are appropriate at that time.

8. Whether or not the disputed employees are included in the bargaining unit, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on December 10, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. As a result, we are satisfied that this dispute cannot affect the applicant's right to certification. In these circumstances, the Board would normally issue an interim certificate to the applicant.

9. However, counsel for the respondent took the position that an interim certificate should not issue because the breadth and nature of the challenges raised by the respondent meant that collective bargaining would be artificial and meaningless until those disputes were resolved. He suggested a number of ways in which he anticipated the outstanding dispute would complicate the bargaining process, with the main thrust of these examples being the extent to which the respondent's negotiating strategy on monetary issues would be hindered by not knowing the full range of the bargaining unit. He argued vigorously that the alleged lack of community of interest between those in dispute and those currently agreed upon as included in the bargaining unit significantly changed the complexion of negotiations.

10. The applicant argued that an interim certificate should issue in the usual manner because the process of resolving the disputed positions was likely to be lengthy, and there were a large number of areas in collective bargaining which could be fruitfully addressed by the parties as they were unaffected by the dispute. Mr. Meneghini provided a number of examples of substantive subjects normally dealt with in collective bargaining which would be unaffected by the bargaining unit dispute including holidays, vacations, seniority, job posting, layoffs, training programmes, and so forth. The Board was asked not to penalize employees whose inclusion in the bargaining unit was undisputed by indefinitely postponing the bargaining process. The applicant also suggested that the respondent's request was part of a strategy to delay the onset of collective bargaining by creating an extensive dispute about the composition of the unit and then opposing an interim certificate on the basis of that dispute.

11. The respondent's counsel denied such a strategy existed and described how the bargaining unit problem might affect some of the non-monetary areas of negotiations raised by the applicant.

12. The majority of the Board gave the following oral ruling:

The majority of the Board (Board Member Gallivan dissenting) is of the view that subject to the Board's second check, an interim certificate should issue. We therefore so order. Our reasons will follow.

We now provide our reasons.

13. Section 6(2) of the *Labour Relations Act* provides as follows:

Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

14. As the Board noted in *City of Mississauga Public Library Board*, [1976] OLRB Rep. Feb. 1, this section was established to reduce or eliminate the mischief which may be caused by the delay attendant on a bargaining unit dispute during the critical post-certification period:

This section of the Act allows the Board to certify a trade union pending a resolution of a bargaining unit dispute in those situations where the ultimate determination by the Board cannot affect the right of the union to certification. Prior to its enactment a union which had established the required membership support could not commence to negotiate a first agreement and was required during the critical period of high expectations and uncertainty to await the final bargaining unit determinations. The amendment is designed to neutralize whatever prejudice may be suffered by a trade union and its constituents in these circumstances by confirming its right to certification and by permitting it to serve notice and to commence to bargain pending the resolution of bargaining unit disputes.

15. In this case, approximately one-third of the total number of possible bargaining unit employees are in dispute. Although this is a substantial number, the Board has commented that the prime consideration in the exercise of the Board's discretion under section 6(2) is whether meaningful bargaining can take place, rather than any particular formula based solely on the size of the dispute:

The bargaining unit dispute before us may be termed typical or normal. It involves a single classification which sits on the line of managerial demarcation. It must be assumed that the Legislature envisaged precisely this situation when it enacted section 6(1a) [now section 6(2)] and the Board, therefore, must be circumspect in exercising its discretion to withhold interim certification in circumstances such as these. This is not to infer, however, that if more than one classification was in dispute or if some fixed percentage of the potential bargaining unit was in dispute that the Board would withhold interim certification based on these factors alone. The exercise of the Board's discretion under section 6(1a) [now section 6(2)] should never be based solely on the number of classifications in dispute or on the percentage of disputed persons in the proposed bargaining unit. The exercise of the Board's discretion must be on a *case to case* basis whereby the prime consideration is whether or not meaningful bargaining, on even a restricted number of items, can take place. If meaningful bargaining cannot take place, for reasons related to a genuine bargaining unit dispute, then the Board in the exercise of its discretion must consider the negative effect of placing the parties in a collective bargaining interface at that point in time.

[emphasis in original]

16. The Board also described its approach in *University of Ottawa*, [1975] OLRB Rep. Sept. 694 as follows:

It may well be that problems of the sort suggested by the respondent will to some indeterminate extent restrict or inhibit bargaining. However, none of the problems to which the respondent has alluded are, in our view, insuperable barriers to the commencement of bargaining and it cannot therefore be said that no useful purpose is to be served by granting interim certification. Accordingly, we are prepared to grant the applicant's request, pursuant to the provisions of section 6(1a) [now section 6(2)] of the Act.

17. Although we recognize that bargaining will be more restricted as a result of the dispute, there are many aspects of the normal collective bargaining process that can be meaningfully addressed by the parties prior to the resolution of the bargaining unit dispute. While we agree with the respondent's counsel that some of the non-monetary issues will also be touched by the dispute, they are affected so peripherally that there is considerable room for productive and effective negotiations to take place in the interim.

18. We note that it is precisely when a bargaining unit dispute is so extensive and thus the delay involved much greater that the applicant is in the most serious danger of suffering the prejudice which section 6(2) was designed to prevent. While this dispute may mean that both parties will have to employ more flexibility and creativity in the actual process of collective bargaining than they might otherwise have had to do, on balance, we find that the problems raised by the respondent are not insuperable barriers to the commencement of bargaining, and that meaningful collective bargaining can take place.

19. Accordingly, an interim certificate will issue in the terms described in paragraph 3. A formal certificate must await the final determination of the bargaining unit.

DECISION OF BOARD MEMBER R. J. GALLIVAN;

1. As mentioned by the majority, I dissented when it gave its oral ruling in favour of granting interim certification. I did so for the following reasons.

2. The Board's interpretation of section 6(2) of the *Labour Relations Act* supports interim certification where *meaningful* bargaining can take place pending resolution of the bargaining unit description dispute. I do not believe that this case meets such a test, not so much because of the large number of disputed job classifications (although that too must be weighed) but primarily because of the very nature of many of the jobs in dispute.

3. It is apparent from the argument both of respondent's counsel and of the spokesman for the group of objectors that the evidence to be put during examination before a Board Officer will show that there are at least two different types of employees in the company's offices - those essentially doing routine clerical, stenographic and technician work on the one hand, and on the other those doing work of a more highly professional, technical and managerial nature. The two types of employees have differing terms and conditions of employment, are paid under differing salary systems, and are covered by separate and different benefit plans, incentive and profit-sharing programmes.

4. It seems obvious in such circumstances that bargaining of substance cannot occur until the parties know who they are bargaining about. As a Board whose members are appointed for their putative expertness in labour relations, we may reasonably take note that the applicant and respondent in this case have wide collective bargaining experience and likely have many standard contract clauses to cover routine matters which would easily and quickly be agreed upon. To expect them to go beyond that is unrealistic in the circumstances. Thus nothing of use to these particular parties is to be gained by forcing them into premature bargaining.

5. The Board should grant interim certification only where it is evidence that the inclusion or exclusion of one or more disputed classifications cannot reasonably be a major consideration in the determination of either party's bargaining strategy. In this case, the number and nature of the disputed classifications is such that the bargaining strategy of both parties cannot help but be significantly affected. Meaningful bargaining thus cannot take place and so the Board should not require the parties to engage in the sham of surface bargaining which it condemns in other circumstances.

0897-86-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), Applicant, v. Starcan Corporation c.o.b. Concorde Metal Stampings, Respondent, v. Group of Employees, Objectors

Certification - Representation Vote - Following announcement of the vote results, union opponents asserting that Board should not give effect to representation vote in favour of union - Allegations of intimidation not raised in a timely manner indicating reaction to outcome of vote rather than atmosphere in which it was conducted - Certificate issuing

BEFORE: Vice-Chairman *R. O. MacDowell*, and Board Members *I. M. Stamp* and *David Patterson*.

APPEARANCES: *L. A. MacLean, Q.C., Clare Meneghini, Ken Simpson, H. Mitic* and *Darlene McAlgy* for the applicant; *Anne Sorenson, A. Chabola* and *Ray Quenneville* for the respondent; *R. G. McLister, Sue Jackson, Gertrude Rhea, Joan Armstrong, Nancy Somerville, Roberta White, Wilfred R. Lalonde* and *Gregory James Lumley* for the objectors.

DECISION OF THE BOARD; January 8, 1987

1. This is an application for certification. In order to put this decision in context, it is necessary to sketch in some background.
2. As its name suggests, the respondent employer is in the metal stampings business. It has a small plant in Tilbury, Ontario. The company employs approximately 100 employees, most of whom work on a full-time basis. The applicant is a national union which came into being when the Canadian section of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) separated from its American parent organization. For ease of exposition, we will refer to the applicant as "the union" and the respondent as "the employer" or "the company".
3. In mid June 1986, the union commenced an organizing campaign among the company's employees. It had some initial success. This certification application was filed on June 27, 1986. The Board directed that Notices of this application, in Form 6, be posted on the company's premises in prominent places where they would most likely come to the attention of the employees potentially affected. The Notice indicates, among other things, that employees objecting to the union's certification should do so in writing, and that objecting employees would have an opportunity to make representations to the Board at a hearing which would take place on July 25, 1986.
4. By the date of the hearing, the Board had before it documentary evidence of union membership filed (prior to the terminal date) on behalf of more than fifty-five per cent of the employees in the bargaining unit (which the parties agreed upon and which is set out, more specifically, in paragraph 5 of the Board's decision of July 29, 1986). That evidence took the form of union membership cards, which consist of a combination application for and acceptance of membership, together with a portion indicating that at least \$1.00 has been paid in respect of union dues. Each card is signed by the employee, and, in addition, it is countersigned by the individual who solicited his/her support, to verify that the initiation fee has been received. The documentary evidence of membership is supported by a properly completed Form 9 Statutory Declaration attesting to its regularity and sufficiency. At the time of the Board hearing on July 25, 1986, there is nothing on the record to indicate that, there was any allegation of impropriety in the solicitation of these membership cards, or any assertion that they did not represent the voluntary wishes of the employees who had signed them.

5. By the date of the hearing there was also before the Board a statement in the form of a petition, filed in a timely manner, signed by a number of employees, and indicating that they were opposed to the certification of the applicant union. This document included the names of some individuals who had previously signed union membership cards, and had purportedly had a “change of heart” about the value of trade union representation. In addition, there was yet another document filed by an employee who had first signed a membership card, then signed the petition in opposition to the union, then later signed a subsequent reaffirmation of membership support. Obviously, there was some ambivalence on the part of some employees, about the value of trade union representation.

6. On the day of the hearing, the union, the employer and the objecting employees were all represented. The parties agreed that the union’s right to represent the employees should be determined by a secret ballot vote conducted and supervised by the Board. This resolution of the case was, in fact, consistent with the submission by the objectors that there should be a representation vote. It was agreed that the vote should be taken on Wednesday, September 3, 1986 at the company’s premises in Tilbury, Ontario. There was, and is, no dispute about the composition of the voters’ list. Notices were posted to advise employees of the purpose of the vote.

7. The Board directed and conducted a representation vote in accordance with the parties’ agreement. Between the date of the hearing (July 25th) and the date of the vote (September 3rd), there was no allegation of irregular conduct, intimidation, illegal campaigning, or any other impropriety. There was no suggestion, from anyone, that the vote would not reflect the employees’ true wishes, or should be postponed, or should be conducted with any extraordinary safeguards.

8. The vote took place as scheduled. The union, the employer and the objecting employees appointed scrutineers. There were 99 persons on the revised voters’ list. All eligible voters cast ballots. The union, the employer, and the representative of the objecting employees, all agreed that those ballots should be counted. Once again, there was no suggestion, by anyone, that those ballots would not accurately reflect the wishes of the employees who cast them. There was no request that the ballot box be sealed and the ballots not counted until outstanding concerns could be investigated or pursued. There were no concerns raised at all. All parties were content to get on with the count.

9. The count, when completed, revealed that more than fifty per cent of the employees had voted in favour of trade union representation. Following the count, the representatives of the union, the employer and the objecting employees executed a “certification of conduct of election” form which reads as follows:

We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

10. After the vote had been counted and the results recorded, the Board official prepared a Returning Officer’s report. A notice of that report, in Form 70, was posted on the company’s premises. It indicated that the union supporters, by a majority, had won the vote. It further advised that if anyone had representations to make concerning the representation vote or the conclusions the Board should reach in view of its results, such representations should be directed to the Board in writing.

11. Quite a number of the employees took the opportunity to write to the Board. They asserted either that the union should not be certified despite the results of the vote, or that the

Board should direct a new vote. Their particular submissions will be referred to in more detail later. At this point, it is sufficient to note that, with only a couple of exceptions, these current objectors did not sign union membership cards and are the same individuals that supported the petition opposing certification and requesting a representation vote. They now resist the consequences which would ordinarily flow from that vote: namely, certification of the union as the employees' bargaining agent.

12. Counsel for the union argues that, since the union "won the vote", the Board should issue a certificate so that the union can get on with the process of collective bargaining. Counsel asserts that the continuing opposition by union opponents has frustrated the will of the majority. He characterizes the arguments now advanced by the objectors as irrelevant, insubstantial, nebulous, vague, speculative, and, for the most part, untimely. He asks rhetorically: if the objectors were so concerned about the allegedly improper influences exerted on them, or said to be prevalent in the work-place, why did those concerns only surface *after* the vote had been taken and the ballots counted? He further argues that even if all of the allegations are true, they would not support the remedy requested.

13. Why do the objectors assert that the Board should not give effect to the representation vote? Their reasons are many and varied. We shall deal with them below, preserving the anonymity of the particular complainants, as we were asked to do. We should note, however, that these complaints were initially filed without the benefit of legal advice, and counsel for the objectors quite candidly conceded that a number of them were not relevant to the remedy urged upon us. That is why the Board accepted the union's submission that we should review the allegations, one by one, to identify those upon which the objectors really relied. The Board then called upon the objectors to address the argument that even if all that they asserted was true, it would not prompt the Board to dismiss the application or set aside the representation vote. It appeared to the Board that, it would make little sense to embark upon time-consuming and expensive litigation where the allegations, if proved, would not support the remedy requested; moreover some of the objectors indicated a reluctance to identify themselves and give evidence (as they would have to do to prove their case). If their evidence would not be determinative in any event, there was no reason to put their allegations to the test of proof and thereby reveal their identities. It was also apparent that the Board could not possibly complete the objectors' evidence on Friday, November 21, 1986, the initial day of hearing, and could not properly even *begin* that evidence, because the union had not been supplied with sufficient particulars of the objectors' allegations. Accordingly, the Board called upon counsel for the objectors to outline his argument for the relief requested, *assuming the truth* of all that his employee clients had alleged.

14. It will be convenient to begin with those items which counsel conceded or the Board ruled were irrelevant, untimely, or would not cast doubt upon the validity of a representation vote. We will then turn to those items which are (arguably at least) more substantive, for in the flurry of employee submissions which followed the release of the results of the representation vote, these classes of complaint were intermingled. For our purposes, however, it is best to separate them. In keeping with the employees' wishes, we will not identify the complainants unless it is necessary to do so. We may therefor occasionally refer to particular employees by a single number or letter of the alphabet.

15. The objectors' submission consists of a covering letter containing the names of a number of employees and a number of specific complaints. Attached to it are a series of individual written statements from particular employees. There is a generalized allegation of "intimidation", (without particulars), but counsel does not rely upon it. He does rely upon some of the more specific complaints set out in the written material.

16. The covering letter complains that there were a number of people who were not approached to sign union membership cards [during the organizing campaign in June 1986]. The objectors protest that the union told some of their fellow employees that, with union representation, they would have better jobs, better wages, and better job security. They could have a “clean record every six months” and that, if they were unsatisfied, the union could be “voted out” after one year’s time. The objectors charge that some employees were not fully informed of union meetings and that a union representative indicated that at a particular union meeting, only those interested in joining the union would be invited. The objectors complain that (in their opinion) most of their fellow employees do not really understand what the union can or cannot do for them, and that during the organizing campaign they were “misled” into “believing things that may never happen”. This assertion was not particularized further, but essentially amounts to the charge that their fellow employees did not know what they were doing when they chose to support the union.

17. It will be remembered, however, that the employees had several opportunities to signify their views: by signing a union membership card, by signing a statement of opposition circulated by the objectors, and in the representation vote where employees were asked to indicate whether or not they wished to be represented by the union. Notices of that vote, and its purpose, were posted in prominent places on the employer’s premises. All parties, including the objecting employees, had about six weeks to “campaign” in favour of their particular viewpoint. There is no dispute that there was an active campaign. While employees may have been influenced by union objectives or promises which depend for their fulfillment upon the success of negotiations, that is no reason to set aside the vote. If promises which may be difficult to fulfill were grounds for setting aside an election, few federal or provincial elections in recent years would withstand scrutiny.

18. Employee “Q” writes to complain about his “predicament” *since* the union vote, and to allege that he is being harassed, and called “ignorant names”. He says that a gas cap was stolen from his van and that he heard “through the grapevine” that there would shortly be an election of union officers, and that only those persons who were union members would be allowed to elect officers. He asserts that this is “discrimination”. Counsel does not rely upon this item. Another employee cited another conversation with a fellow worker *following the representation vote* in which that fellow worker was asked to speculate upon the situation of the employees who were not then union members. Counsel does not rely upon that conversation either. Both involve events following the vote and are not logically connected to its conduct or outcome.

19. “C” objects that s/he was never approached to sign a union card and did not know that there was a union meeting. “A”, “M” and “R” protest that they were not invited to certain union meetings during the organizing campaign *in July* (i.e. before the certification hearing) - even though they were not, at that time, union supporters. Four employees protest a later notice sent to union members advising of a meeting to which, they say, they were not invited. They feel this is a form of “discrimination”.

20. But there is no obligation upon the union to invite non-members to its meetings; and leaving aside, for the moment, the question of how the union could be expected to mail copies of a meeting notice to persons who, by and large, had not signed membership cards or given the union their addresses, this description of the notice in the foregoing paragraph is a complete misreading of the document to which the objectors refer. That notice, on its face, is *quite clearly* addressed to all *bargaining unit members* and urges employees to “make every effort to attend and remind your workmates as well”. The stated purpose of the meeting is the election of a negotiating committee. The notice states that “only CAW members can participate in this meeting, however there will be CAW application for membership cards available for those who are not yet members”. We find it difficult to appreciate the basis of the objectors’ complaint, unless they are suggesting some right to

participate in the affairs of the union even though they are not members and still oppose the process of collective bargaining for which purpose the negotiating committee was to be constituted. The notice, in any event, was issued, well after the vote. When pressed, counsel indicated that he did not rely upon this item either. We include it for the purpose of completeness.

21. Employee "E" complains that *during the organizing campaign* she was harassed by "F" to use her influence to persuade another employee to sign a membership card. According to "E", she tried to ignore the entreaty and walked away. This allegedly occurred on July 3, 1986, *three weeks before the first certification hearing and two months before the representation vote*. It is simply too late to raise it now, nor is it connected to the employees' participation in the representation vote. Similarly, it is too late for "G" to complain that during the organizing campaign he received numerous late night phone calls urging him to join the union (He didn't).

22. Employee "I" complains that on August 7, 1986, while walking to get gloves, she was "hassled". Employee "K" received phone calls on August 12th, August 14th and August 18th, to the effect that her attitude had better change as well as "her vote". The identity of the caller is not known. According to the objector, she said her piece and hung up. She also protests that her vehicle was tampered with and that she was not invited to any union meetings or to sign a union membership card.

23. Counsel for the objectors places primary reliance on certain incidents of alleged property damage which occurred between July 26, 1986, and September 3, 1986, the date of the vote. The allegation is that the cars of six union opponents (including one nominal former supporter) were scratched or damaged in some way by persons unknown. Counsel for the objectors maintains that, in a small plant, everyone knew "where their fellow employees stood" on the question of union representation, and the scratched vehicles were most probably the work of union supporters. However, there is no indication about who might be the culprit and, perhaps surprisingly, one person whose car suffered damage was a union member who had not even taken part in the petition opposing the union. It is not obvious to us why she should assume union sponsorship of such act, even if someone said to her "payback is a bitch, isn't it, you have to vote the right way to keep things safe".

24. There is no allegation that an official of the union was involved in or condoned this property damage or the phone calls; nor, counsel concedes, has he any evidence to point to the involvement of any particular individual. He argues that it is a reasonable inference that the damage was perpetrated by one or more union supporters. Counsel for the union resists that inference and replies that, should this case proceed, there will be allegations that the damage to vehicles was not confined to union proponents - an assertion which we record but discount for the purposes of this decision. He argues that the conduct of hot-headed unidentified partisans should not be allowed to scuttle a representation vote, because, if the Board were to so rule, random damage "by persons unknown" could always sabotage and delay the process, even though there is no direct evidence of actual intimidation and no evidence that the applicant union was involved. Anyone so inclined could fairly easily frustrate the vote. Counsel points out that to hear the objectors' evidence, could delay this case for months, totally undermining the expeditious process of certification which is essential to the establishment of a sound collective bargaining relationship. As Estey C.J.O. (as he then was) put it, in *Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild et. al.* (unreported, March 31, 1977 Ont. C.A.): "the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied". Counsel urges the Board not to plunge this case into long hearings into matters which, he says, should not affect the ultimate result.

25. Counsel for the employer takes no position on any of these matters. In her submission, the employer's wish is to remain "neutral" as between two contending employee factions.

26. Counsel for the objectors maintains that when the above-mentioned phone calls, property damage, and "hassles" are viewed cumulatively, the Board should conclude that there was a tangible and pervasive atmosphere of "intimidation" which would prevent the employees from freely expressing their wishes for or against the union in the Board-supervised secret ballot vote. Counsel for the objectors does not suggest that any of his clients were themselves moved from their previously expressed opposition to the union. He argues that *other* employees *may* have been influenced and, for that reason, there should, at the very least, be a new representation vote. He argues that even though no employee has actually pleaded that he was intimidated into changing his vote, that is a reasonable probability in the circumstances for at least some employees and that, therefore, another vote is necessary to clear the air. He asserts that his clients did not bring the above-mentioned problems to the Board's attention until after the vote results were released, because they were unsophisticated and did not fully appreciate their rights.

Decision

27. For the purposes of this decision, we have accepted, as true, all of the allegations contained in the employees' written statements of objection. We have then asked ourselves whether those factual assertions, assuming them to be true, would support the objectors' proposed disposition of this case: either dismissal of the certification application or the direction of a new representation vote. We have concluded that they would not.

28. It is obvious to us that the situation in the employer's plant is not a happy one. Its work force is divided into two warring camps: those who fervently support the union and those who fervently oppose it. That division was evident as early as July 25, 1986, when the Board recorded the "line up" of employees supporting and opposing the certification application, and there is no dispute that the organizing campaign has resulted in some bitterness and name-calling. It is an unhappy situation for both union and employer alike, because friction between employees undermines the union's solidarity and effectiveness and, at the same time, inhibits the employees' ability to work together as an effective team. However, the question is whether, against this background, punctuated by the mischief of over-zealous or vindictive (but unidentified) persons, the Board should give effect to the results of the representation vote.

29. We do not condone these sporadic acts of property damage (whoever may be responsible), nor are we sanguine about a work force divided into conflicting factions. However, where there are committed proponents on both sides, and a group "in the middle" who may be ambivalent, the ballot box is a great leveller, allowing employees to express their preferences with the assurance that their ultimate choice will be entirely confidential. There is no way that anyone can know how particular employees have voted; and, in this regard, the situation is quite different from that of trade union membership evidence or written statements opposing the Union where employees are invited to publicly record their allegiance one way or the other. Such public acknowledgments may well expose them to censure or antagonism whichever option they select, and where there is actual evidence of threats or intimidation, or, in the case of anti-union petitions, the perceived influence of management, the Board may disregard this documentary evidence or, where it is equivocal, seek the confirmatory evidence of a representation vote (see: *Kendall Co. (Canada) Ltd.* 1975 OLRB Reports August 611). The inherent secrecy of the voting process avoids most of these problems.

30. We accept the proposition that, in appropriate circumstances, an atmosphere of violence or threats of violence may impair an expression of employee free choice, just as an employ-

er's threat of economic reprisals (such as a layoff or plant closure) may raise fears about the employees' job security and thus improperly influence the voting results; moreover because of the employer's control over job opportunities and rewards it is strategically placed to carry out such threats. Where the applicant union, as an institution, suggests that employees will be penalized because of the free exercise of their franchise, the Board may also be inclined to intervene. However, where the allegations concern friction between rank and file employees, the effective administration of the Act and the achievement of its objectives requires a recognition of the fact that for some employees, union representation can be a volatile and emotional issue. Debate may degenerate into bad feelings, ruined friendship and recriminations. While the Board always has the authority to set aside a representation vote and order a new one, that is not a neutral decision, nor one which should be lightly taken and in our view should not be taken unless the occurrences are so serious and pervasive as to render improbable a reliable expression of employee wishes despite the sanctity of the ballot box.

31. Here, of course, save for the "hassles" mentioned above and perhaps the comment recorded in paragraph 23, there are no actual threats levelled against Union opponents or 'neutrals' and much of what is complained of is not connected logically or in time to the voting process. There is no allegation that any employee was actually induced to change his vote because of the events preceding the election. There is no assertion that the Union, as such, was involved in, condoned, or supported, any of the alleged improprieties. The election was conducted in a manner which ensured the secrecy of the ballot. The security and propriety of the election mechanism was certified by the objectors' own scrutineers. Prior to the balloting, no anti-Union objectors raised any concern whatsoever about what they now say was a "pervasive atmosphere of intimidation or coercion" which, they now say, totally poisoned and perverted the electoral process. Their representative on election day was quite content to count the ballots, without reservation. No concerns were raised until some days *after* it was announced that the Union supporters had prevailed.

32. This is not to say that employees who fail to raise their concerns, in a timely fashion prior to the vote, will be irrevocably precluded from doing so later, or to suggest that a party that agrees to counting the ballots will later be precluded from challenging the vote. This is not an area amenable to hard and fast rules, and we agree with the objector's counsel that some allowance must be made for unsophisticated or unrepresented employees. But, by the same token, if union opponents propose to challenge a secret ballot vote on the basis of a "pervasive atmosphere of intimidation" which renders its results unreliable, citing individual incidents which occurred in the weeks or months preceeding the vote, they must raise their concerns in a timely manner or risk the inference that they are reacting to the outcome of the vote rather than the allegedly negative atmosphere in which it was conducted.

33. Assuming all of the objectors' allegations to be true, we would not be disposed to disregard, or exercise our discretion under section 103(5) of the Act to set aside, the representation vote and order a new one. We are not persuaded that these sporadic acts of damage (however reprehensible, and whoever may be responsible) are sufficiently serious to warrant setting aside the vote. We are merely reinforced in that conclusion, by the fact that, prior to the announcement of the count, no one else raised any concern about the efficacy of the process either.

34. For the foregoing reasons, a certificate will issue to the applicant in respect of the bargaining unit defined in paragraph 5 of the Board's decision of July 29, 1986.

2355-85-R Labourers' International Union of North America, Local 493, Applicant, v. **E & E Seegmiller Limited**, Respondent, v. International Union of Operating Engineers, Local 793, Intervener

Bargaining Unit - Certification - Construction Industry - Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count - Board suggesting use of a representative period be eliminated

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *R. M. Sloan* and *J. Sarra*.

APPEARANCES: *David Strang* and *Bill Suppa* for the applicant; *Daniel Fryzuk* for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; January 28, 1987

1. This is an application for certification within the meaning of sections 119 of the *Labour Relations Act* and is made pursuant to the provisions of section 144(1) of the *Act*.

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[Paragraphs 2 to 9 omitted: Editor]

10. The applicant sought to have Thomas Brooks, Werner Goerg and Aubrey Mason excluded from the list of employees on the basis that they exercised managerial functions within the meaning of section 1(3)(b) of the *Act*. The respondent asserted that these persons were working foremen and were therefore properly included in the bargaining unit. The applicant also sought to have James Murray deleted from the list on the basis that he was not doing bargaining unit work. The respondent took the contrary position.

11. At the hearing of the matter on December 11, 1986, the applicant withdrew its challenge with respect to Thomas Brooks. Having regard to that and to the evidence before the Board, we find that Thomas Brooks is properly included on the list of employees in the bargaining unit.

12. In applications for certification in the construction industry, a person must be at work for the respondent employer on the date that the application is made in order to be included in the bargaining unit for the purposes of "the count" (see for example *Smiths Construction Company Arnprior Limited*, [1984] OLRB Rep. Mar. 521 among others). In addition to actually being at work, the employee must have spent a majority of his time on the date of application doing bargaining unit work (see for example *O. J. Jaffrey Limited*, [1964] OLRB Rep. Aug. 233; *Clairson Construction Company Limited*, [1968] OLRB Rep. April 126; *George and Asmussen Limited*, [1971] OLRB Rep. Oct 683 among others). Where an employee was doing the work of one trade or craft on the date of application but prior thereto had been engaged in doing the work of several trades or crafts at the same wage rates, the Board has long been willing to examine a period of time prior to the date of application that is representative for purposes of ascertaining what work the employee spends the majority of his/her time doing and so determine whether or not that employee should be included in the bargaining unit. The length of this "representative period" has heretofore varied on a case by case basis (see for example *Heath Construction Inc.*, [1977] OLRB Rep. Oct. 691; *J. M. Chartrand Realty Ltd.*, [1978] OLRB Rep. May 423; *Di Marco Plumbing & Heating Company Limited*, [1985] OLRB Rep. May 659; *Des-Build Development Limited*, [1983] OLRB Rep. Nov. 1793 among others). It has also been suggested that the Board may look to the primary reason for which the employee was hired in order to determine his/her classification (*Pre-Con Murray*, [1965] OLRB Rep. Jan. 1003) but this test has largely been used in the circum-

stances where the evidence of what the employee actually did does not answer the question of whether the employee should be included in the bargaining unit (see for example *Des-Build Developments Limited, supra* and *Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924). In summary, the Board has looked at the following criteria in making its determinations:

- (a) whether the person concerned was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application; or
- (c) where, previous to the date of application, the person has been engaged in the work of more than one trade or craft and the work s/he performed on the application date does not accurately reflect the work s/he normally spends the majority of his/her time doing, the work done by that employee during the appropriate representative period prior to the date of application; or
- (d) where there is inconclusive evidence with respect to the work in which an employee has been engaged, any other relevant factor, including the primary reason for hire.

13. Further section 1(3)(b) of the Act provides that, subject to section 90, no person shall be deemed to be an employee, who, in the opinion of the Board, exercises managerial functions. In applications for certification in the construction industry, as in all certification applications, the Board excludes all persons employed at and above the lowest level of managerial personnel employed on the date of application. However, unless they have an overall responsibility for a project or can and do affect the employment status of employees, working foremen are usually included in a construction industry bargaining unit.

14. In addition to the *viva voce* evidence of the 3 employees whose status remained in dispute between the parties, the Board has had the benefit of the testimony of 6 other witnesses and the relevant records of the respondent with respect to the project in question in this proceeding. The latter are admittedly incomplete (some records having been lost or destroyed in the normal course of business) and consist of various daily cost sheets, foremen's hour reports and daily time sheets, drillers notes, and blasters record sheets. The records are kept by the employer as part of its internal costing procedure and their objective is largely to allocate the expenses for the job being done. Consequently, although they do reveal the number of hours for which an employee was paid, they do not necessarily reflect precisely what work, if any, an employee was doing at any given time. The evidence of Jim Lacharity, the project superintendent, reveals that the reports from the field are sometimes "adjusted" by him to ensure that employees do not get paid for a greater number of hours than they actually worked. This, and the purpose of the records, may account for the acknowledgment by Gunther Hell, the respondent's "paymaster", of a discrepancy between the blaster's record sheet and the costing sheet for December 12, 1985 with respect to the people doing blasting work on that day. Consequently, the respondent's documentary evidence, while of some assistance, is not determinative of the status of any of the persons remaining in dispute.

15. On balance, the evidence reveals that James Murray should be excluded from the bargaining unit. There is a serious conflict in the evidence with respect to what Mr. Murray was doing on the date of application. His own evidence on the point is inconsistent. Messrs. Archambault and MacDonald, both drillers who gave direct evidence of what they say they definitely saw, testified

that Mr. Murray was not operating a drill. Other testimony and the respondent's records suggest he was drilling. In any case however, the evidence, though somewhat vague, suggests that, prior to the date of application, Mr. Murray spent the majority of his time at work on a rock truck and somewhat less time operating a drill or assisting with blasting.

16. The evidence with respect to Aubrey Mason reveals that he was more than a working foreman and he too should be excluded from the bargaining unit. Mr. Mason was referred to by other employees, and by himself, as a "foreman". Among other things, he drove the various drill operators to their job site on the project in a half-ton company owned pick-up truck, ensured that their machines were started, and that they were doing the right thing in the right place. He did not work on a crew and generally supervised and was involved with all the respondent's employees on the job site, including Werner Georg. He was generally responsible for keeping track of the work being done on the project. He did, in the usual course of his duties, operate any machinery or use any tools. On a regular, almost daily basis, he provided verbal assessments of the performance of other employees to management and he had some limited input into hiring. Mr. Mason had the authority to spend small amounts of money for fuel and supplies on behalf of the company and had keys to all of the bunkhouses and to the padlocks on the machinery. In our view, Mr. Mason exercised managerial functions within the meaning of section 1(3)(b) of the Act.

17. Though the situation with respect to Werner Goerg is less clear than with Mr. Mason, the result is the same. Mr. Goerg did work actively on the blasting crew and was responsible for the blasting operations at the material times. He sat in on interviews with respect to employees and had some influence with respect to the hiring of potential employees to the extent that his advice with respect to hiring was never not taken. However, this seems to relate mainly to potential employees in the respondent's blasting operations and he, as blasting foreman, was likely there because of his blasting expertise. More significant was his ability to have a negative effect on employees. For example, he routinely checked and corrected the work of other employees, made verbal reports with respect to their performance, and had the power to send employees back to the office or change their job (duties). Occasionally, he was asked whether or not employees should be kept on or terminated. He also had the power to grant brief periods of time off (to permit employees to visit their dentist or doctor for example), and he could and did schedule overtime on occasion. He was also responsible for reporting the number of hours that the employees worked for him and it is on the basis of his reports that these employees were paid. Further, if he agreed with complaints to him that there had been errors made in the payments to employees, he had the power to direct that the error be corrected. On balance, we find that Mr. Goerg exercised managerial functions within the meaning of section 1(3)(b) of the Act and should be excluded from the bargaining unit.

18. In summary, we find that the list of employees, for purposes of the count, in the bargaining unit as found by the Board consists of the following persons:

Paul Archambault
Thomas Brooks
Bert Duchesne
Mike MacDonald

19. The applicant has filed membership evidence, described in paragraph 5 above, on behalf of three of the persons referred to in paragraph 18.

20. The Board is therefore satisfied on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 27, 1986, the terminal date fixed for

this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

21. Section 144(2) of the Act provides for the issuance of more than one certificate if the applicant has the requisite membership support as follows:

..., the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 144(2) of the Act, a certificate shall issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

22. Further, pursuant to 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all other sectors of the construction industry in Board Area 17 (that is within a radius of 57 km of the City of Sudbury Federal Building), save and except non-working foremen and persons above the rank of non-working foreman.

23. In making our determination with respect to Mr. Murray, we considered the work performed by the persons whose status was in dispute in these proceedings both on the date of application and during a period prior to that date. However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" had tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application or
- (c) where there is no conclusive evidence with respect to the work that the

employee performed on the date of application, any other relevant factor, including the primary reason for hire.

0376-86-R; 0389-86-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant, v. **Elgin Construction Company Limited**, Respondent, v. Group of Employees, Objectors

Certification - Construction Industry - Evidence - Practice and Procedure - Union submitting that Board should not entertain employer's evidence on ground it was obtained in violation of Act - Manner in which evidence obtained not a proper basis on which to exercise discretion to refuse to admit relevant evidence

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *Stephen Krashinsky* for the applicant; *Richard J. Charney* for the respondent; no one appearing for the objectors.

DECISION OF THE BOARD; January 7, 1987

1. The continuation of the hearing in this application for certification was scheduled to deal with certain matters arising out of charges filed by the respondent with respect to the membership evidence filed by the applicant. After receiving the submission of counsel, the Board delivered the following oral decision at its hearing in this matter on December 23, 1986:

In this application for certification, the respondent filed allegations about the manner in which the applicant obtained its membership evidence. Those allegations, in the main, suggest that the applicant informed employees that it would only cost one dollar to join at the time of organizing, but would cost \$300.00 later.

Counsel for the applicant submits that the Board should not entertain any evidence about these allegations on the grounds that the respondent violated the *Labour Relations Act* in obtaining the information that forms the basis of the allegations. Counsel suggests that the Board should develop and apply a rule of evidence, not unlike the exclusionary rule developed in criminal cases in the United States and now in Canada under section 24 of the *Canadian Charter of Rights and Freedoms*. Counsel argued that the Board had a discretion to admit or refuse to admit evidence under section 103(2)(c) of the *Labour Relations Act*. In exercising that discretion, the Board should be concerned about the manner in which evidence was obtained since admitting evidence that came to the Board's attention as a result of a violation of the Act would only serve to encourage people to violate the Act. Counsel also submitted that an exclusionary rule of evidence would ensure that employers would not violate the Act in trying to obtain information that impairs a union's membership evidence.

The Board's duty in a normal certification proceeding is set out in sections 6 and 7 of the Act, or as in this case, in section 144 of the Act. The Board makes that determination based upon the evidence of membership filed and on any other evidence that is relevant to that determination.

While section 103(2)(c) of the Act may give the Board the discretion to refuse to admit relevant evidence, as counsel for the applicant argues based upon *Olympia Floor and Wall Tile Co.*, [1986] OLRB Rep. Feb. 270, we believe that section 102(13) of the Act, which states, in part:

"The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to *present their evidence* and to make their submissions...."

[emphasis added]

provides a positive direction to the Board to receive evidence that would be relevant, cogent and material to the issues.

Proceedings before the Board are not criminal trials. Therefore, we believe that section 24(2) of the *Canadian Charter of Rights and Freedoms* has no application to the reception of evidence in this proceeding.

We believe that the common law rules with respect to the admissibility of relevant evidence, as set out in *The Queen v. Wray* (1970) 11 D.L.R. (3d) 673 (S.C.C.) is the preferable approach to follow in proceedings before the Board. Mr. Justice Martland, for the majority, wrote at page 685:

"... I am not aware of any judicial authority in this country or in England which supports the proposition that a trial Judge has a discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the administration of justice into disrepute. The test of admissibility of evidence was stated by Lord Goddard, C.J., in *Kuruma v. The Queen*, [1955] A.C. 197 at p. 203, as follows:

'In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.' "

We are concerned here with determining the facts relevant to the issues that arise in the certification proceeding. If the evidence is relevant and material to the issues it ought to be admitted. Even though we acknowledge that we have the discretion to refuse to admit relevant evidence, we believe that the manner in which the evidence was obtained is not a proper basis upon which to exercise that discretion.

In *St. Michael's Shops Canada Limited*, [1979] OLRB Rep. April 376 the Board wrote at 377:

"The authorities, however, do not stand for the proposition that a party to a certification proceeding may not bring forth evidence which might raise a doubt as to the reliability what otherwise appears to be acceptable membership evidence. In an application for certification the Board relies on hearsay evidence in determining the membership support of an applicant union. It is not feasible for the Board to hear from each individual who signed a card to ascertain his true wishes or inquire into the circumstances under which he signed a membership card. For this system to operate

effectively the Board must consider any substantial allegation which might cause the Board to doubt the reliability of the membership evidence. To insist that employees alone may raise allegations of intimidation by a union would create an anomalous situation. The more effective the intimidation might be the less likely the Board would be to hear of the violation as its continuing effect could deter the employees from lodging a complaint. For the reasons set out above, therefore, the Board finds that the respondent company in this proceeding has status to raise the allegations of intimidation."

More recently, the Board in *Dough Delight Ltd.* [1986] OLRB Rep. May 603 wrote at 605-606:

"The instances of "non-pay" ultimately established by the Board's inquiry came to light as a result of the actions of a person acting on behalf of the employer - actions which counsel for the applicant say constitute an unfair labour practice. He says this should be taken into account, and that anything short of outright certification would amount to a reward to the employer for these unfair labour practices. We note that the alleged unfair labour practices occurred after the membership evidence in question had been collected and submitted to the Board. The Act clearly defines in section 8 the circumstances in which the occurrence of employer unfair labour practices can diminish the standard or quality of membership evidence which an applicant trade union must otherwise establish in order to be granted either a representation vote or outright certification. The applicant has not invoked that section. We are focusing solely on the reliability of membership evidence, and not on the punishment or reward either of the trade union or of the employer. We cannot ignore facts relevant to a matter which we have a statutory duty to decide merely because of the way their existence was discovered and brought to our attention. We are not satisfied that there is reliable membership evidence in sufficient quantity to grant outright certification or order a vote and so have jurisdiction to do neither. If the respondent or someone acting on its behalf has committed some unfair labour practice, a question we are not called upon to decide, then the appropriate response may be sought from the Board and, if the applicant is so advised and receives Board consent, the court."

Furthermore, we believe that to adopt the applicant's submission would only lead to further protracted proceedings where the focus of the hearings would change from determining the merits of the application to deciding the legality of the process used to gather the evidence that a party might seek to adduce.

We have decided the manner in which evidence is obtained is not relevant to its admissibility. That does not mean that evidence relating to the employer's investigation of the circumstances that gave rise to the allegations is irrelevant. Rather, it may well be that such evidence is relevant to the credibility of the witnesses who testify in support of the allegations, or to some other issues.

Therefore, the motion made by counsel for the applicant to exclude evidence relating to the allegations relating to the collection of membership evidence is hereby dismissed.

2. The hearings in this matter are to continue before this panel of the Board on the dates previously scheduled.

2134-86-M International Union of Operating Engineers, Local 793, Applicant, v. Gaston H. Poulin Contractor Limited, Respondent

Right of Access - Access order for construction project where employees reside in temporary lodgings on site agreed to by parties - Employer's request that union representatives be required to sign a waiver of liability for any injuries that may occur while on site rejected

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *F. C. Burnet* and *H. Kobryn*.

APPEARANCES: *Murray Gold* and *Edward Kaplanis* for the applicant; *Gerald Boivin* and *Gaston Poulin* for the respondent.

DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN, AND BOARD MEMBER H. KOBRYN; December 31, 1986, as amended January 14, 1987

1. This is an application for right of access under the provisions of section 11 of the *Labour Relations Act*, which provides as follows:

Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

2. The respondent is engaged in a highway construction project about 20 miles west of the community of Ignace in the District of Kenora. The respondent's employees reside in a temporary bunkhouse and trailers located on the construction site.

3. This matter was listed for hearing on November 27, 1986. On that date the parties entered into the following agreement:

WHEREAS the parties are desirous of settling the matters in dispute between them, and agree to the following terms of an access order;

THEREFORE, the parties are agreed that the Ontario Labour Relations Board should issue a direction pursuant to s. 11 of the Act on the following terms, and request that the Board adjudicate with respect to the two below stated issues remaining in dispute:

I. AGREED TERMS

1. The two authorized representatives of the International Union of Operating Engineers, Local 793 (the "Union") shall be entitled to access to the project on the following terms and conditions until the terminal date following the date of any application for certification herein:

(a) On each occasion in which the authorized representatives desire access, 24 hours notice shall be given to the company by telephone to the Construction Office (Phone 705-362-4404) or, with 24 hours notice, in person to a foreman of the Employer or to another member of the Employer's supervisory personnel.

(b) After giving notice as aforesaid and after providing proper identification, such as a business card at the project entrance, the authorized representatives shall be transported upon request from the campsite to the worksite to view the site and the working areas. The authorized business representatives undertake not to disrupt or interfere with employees or with work in progress at the work site at such times and agree to abide by all security and safety regulations applicable to the project.

(c) After giving notice as aforesaid, the authorized representatives shall be allowed access to the campsite between the hours of 6:00 p.m. and 10:00 p.m. The authorized representatives agree to abide by all rules and regulations applicable to the bunkhouse and other campsite facilities.

II. TERMS IN DISPUTE

A. The Effective Date of This Order

The Applicant Union requests that this order should be effective immediately. The respondent employer requests that this order be effective as of December 8, 1986.

B. Waiver of Liability

The Respondent Employer requests that the authorized representatives of the Union be required to sign a waiver of liability in respect of any injury or loss that may occur in respect of his person or property while on the worksite. The Respondent Employer further requests that the said authorized representatives produce such waiver of liability upon their attendance at the worksite. The Union rejects this proposal.

4. The parties are in agreement that the Board direct that two representatives of the applicant be provided access to the job site. They have also agreed on a number of terms governing such access. The parties disagree with respect to two matters, namely when the access order should become effective, and whether the union representatives should be required to sign a waiver of liability with respect to any injury or loss that may occur on the job site. Both parties led evidence and made representations to the Board relating to these issues. The Board then made an oral ruling.

5. The respondent contended that the access order should not be effective until December 8, 1986, since that was the earliest date that Mr. Gaston Poulin, the owner of the respondent, could be on the job site. Counsel for the respondent acknowledged that while Mr. Poulin desired to be on the job site when access first occurred, because other management officials would be on the job site, this was not a necessity. The applicant objected to any delay in the access order, voicing a concern that construction activity on the site might soon be halted by winter weather. Having regard to the possibility that activity at the job site might soon come to a halt, as well as the fact that management officials other than Mr. Poulin would be on the site, the Board rejected the respondent's request for a delay and ruled that the access order would become effective November 27, 1986.

6. In support of its position that union representatives be required to waive any liability with respect to possible injury or loss while on the job site, the respondent noted that the job is a particularly dangerous one, involving the blasting of rock. The applicant, however, objected to this requirement, noting that its representatives had already agreed to abide by all security and safety regulations on the project.

7. When directed by the Board, access by union representatives to a job site is a statutory right. The union representatives are in a position similar to others with a legal right to be on the site. The exercise of this right should not be made subject to a willingness to waive liability. In the unlikely event that a union representative is injured or suffers loss when on the job site, the rights of the parties will presumably be determined by a court of competent jurisdiction. Given these considerations, at the hearing we rejected the respondent's request that the union representatives be required to sign a waiver of liability.

8. We hereby affirm our oral ruling of November 27, 1986 granting immediate access to representatives of the union in the terms agreed to by the parties.

DECISION OF BOARD MEMBER F. C. BURNET;

1. I am in accord with the opinion of my colleagues that the access order should become effective November 27th. for reasons cited, but I disagree with their decision with respect to the waiver.
 2. The fact that there is some degree of risk when anyone attends a work site means that there is also a commensurate degree of cost, arising out of potential liability claims. Whether the risk, and therefore the cost is great or small (as the employer and the union respectively argued before us) is immaterial to the issue. The fact is that a cost exists, arising out of the organizing activity, and the question is one of principle as to who should bear it.
 3. Long-established legislative provisions and companion Board policy are crystal clear. An employer is not permitted or required to underwrite or subsidize organizing costs of a union, either unilaterally or by agreement with the union. This is such a cost and the Board should apply the legislative principle and policy to it's allocation.
 4. It is not valid to assign the cost to the employer on the rationalization that the union's right of access is statutorially based. So are many of its rights but this does not mean that the union may pass the cost of exercising those rights to other parties. As a specific example, we do not invoke the statutory basis of the right of access to compel or authorize the employer to pay the union organizer's cost of transport or lodging at a remote site, even when there are no alternative facilities to those of the employer. On the contrary, in that situation, it is specifically required that the employer not pay the costs, though he may be compelled to make his facilities available.
 5. It may be pertinent to consider how this position squares with that of government inspectors and officials who have a similar statutory right of access without being obliged to sign a waiver. In my opinion, their position is clearly distinguishable on two grounds. First, their attendance at the site is either obligatory as a matter of public policy to enforce legislative standards, or it is at the behest of the employer to participate in government services. The union organizer is the representative of a private association, acting voluntarily in pursuit of its own interests and objectives. Second, the union's statutory right of access, like its other statutory rights, is subject to the specific legislative prohibition against the payment of union organizing costs by employers.
 6. I would accordingly grant the employer's request for execution of a waiver as a condition of access.
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1240-86-R Canadian Paperworkers Union, Applicant, v. Great West Timber Limited, Respondent, v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Intervener

Certification - Fraud - Pre-hearing Vote - Reconsideration - CPU certified following two-way vote - Intervening union claiming forged letter containing legal opinion distributed to employees prior to vote - Whether Board should revoke certificate for fraud or reconsider its decision to certify

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *G. O. Shamanski* and *R. R. Montague*.

APPEARANCES: *Ian Roland* and *Michael Hunter* for the applicant; *Marlene Del Pino* for the respondent; *Laurence C. Arnold* and *Fred Miron* for the intervener.

DECISION OF THE BOARD; January 12, 1987

1. By decision dated September 17, 1986, the Board certified the Canadian Paperworkers Union ("the CPU") as the bargaining agent for employees of the respondent Great West Timber Limited ("Great West Timber"). Certification followed a pre-hearing representation vote in which employees had had the opportunity to vote for the CPU or for the intervener Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America ("Local 2693"), the incumbent bargaining agent. The CPU was successful in that vote. It received 101 of the unsegregated ballots cast, while Local 2693 received 65. There were three segregated ballots which were not counted.

2. Counsel for Local 2693 wrote to the Board on October 14, 1986 with respect to an allegation that a "false document" had been distributed by the CPU prior to the vote on August 28, 1986 and requested that the Board revoke the CPU's certificate under section 58 or section 106 of the *Labour Relations Act*. He also requested that the Board hold a hearing into this matter. The Board informed the parties that it would hold a hearing in a decision dated November 28, 1986. That hearing was held on December 12, 1986, in Thunder Bay.

3. In brief the facts are these. Shortly before the August 28th vote, the CPU distributed a leaflet, signed by John McInnes, national representative of the CPU, and entitled "You belong in the Canadian Paperworkers Union ..." with the slogan "Make Thursday, Independence Day" ("the McInnes leaflet"). In addition to emphasising that the CPU is "all Canadian", the McInnes leaflet also referred to a leaflet which had previously been circulated by Local 2693 and which, the McInnes leaflet said, implied "that you may lose your collective agreement if you vote for the Canadian Paperworkers Union". The McInnes leaflet stated that this was a lie and that "[s]ome have asked for this in writing, so attached is a legal opinion confirming what we have told you all along". Randy Haapa, an employee at Great West Timber, and a former steward of Local 2693, now supporter of the CPU, testified that he had asked for a legal opinion to ease the minds of certain older employees, not completely familiar with the English language, who, he believed, were frightened that if the CPU won the campaign, they would lose certain seniority and vacation rights by virtue of the operation of the Act. Attached to the McInnes leaflet was a letter dated August 18, 1986, signed by Douglas J. Wray of the law firm of Caley & Wray, which set out the sections of the Act relevant to a displacement application and the effect of such an application on the employees (for reasons indicated below, this letter is referred to as "the Hunter letter"). It was conceded by counsel for Local 2693 that the content of the Hunter letter could not reasonably be the subject

of complaint and, although certain aspects of its content were raised in the context of its intended effect, little more will be said about the contents of any of these documents.

4. It is the derivation of the Hunter letter which brought about the complaint articulated by counsel for Local 2693 in his letter of October 14, 1986. The letter appears to be a legal opinion written by Mr. Wray at the request of Mr. Hunter; in fact no such letter was written by Mr. Wray, as indicated not only by Mr. Wray in a letter to the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America ("the OPC"), dated October 7, 1986, but also by Mr. Hunter's admission that he fabricated the letter. In 1982, the firm of Caley & Wray had undertaken to the OPC not to represent the CPU when it was involved in raids on the Lumber and Sawmill Workers Union ("Lumber and Sawmill"). Thus the Hunter letter made it appear that Mr. Wray had breached this undertaking; this breach was Local 2693's initial concern and it was not until the October 7th letter from Mr. Wray to the OPC in which he denied having written the letter that the possibility that the Hunter letter was fraudulent arose.

5. The Hunter letter is a somewhat revised version of a letter written by Harold F. Caley, of Caley & Wray, to Mr. Hunter on April 23, 1985, with respect to a displacement campaign by the CPU at Carlton Cards Limited ("the original letter"). Mr. Hunter explained that he retyped the original letter, making some changes to "personalize" the letter to refer to the current dispute, removing certain sentences he considered irrelevant and placed that version on the letterhead from another letter from Caley & Wray which had been signed by Mr. Wray; that letter had been copied to Mr. McInnes (as "J. McGinnes"). He thought the original letterhead and signature were blurred, although we find that in appearance, the Hunter letterhead and the original letterhead are quite similar. The letter was prepared using the facilities of the Lakehead Labour Council Office; Mr. Hunter testified he obtained permission from Cecil Makowski, President of the Labour Council, to use the facilities, but that Mr. Makowski did not know why Mr. Hunter required them. The Hunter letter was then distributed among the employees as a letter written by Mr. Wray specifically for the dispute between the CPU and Local 2693 at Great West Timber Limited.

6. Through his counsel, Mr. Hunter requested the protection of the Ontario *Evidence Act* and the Canada *Evidence Act* with respect to his testimony. Section 14 of the *Statutory Powers Procedure Act* protects Mr. Hunter with respect to the use of his testimony in a civil proceeding. He was further granted the protection of section 5 of the Canada *Evidence Act*. Section 13 of the *Canadian Charter of Rights and Freedoms* in any case guarantees to a witness testifying in "any proceedings" the right "not to have any incriminating evidence so given used to incriminate that witness in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence". That protection applies to any subsequent civil or criminal proceedings regardless of whether the witness requests the protection of the Evidence Acts and whether such protection is explicitly granted.

7. Mr. Hunter testified that only he had typed and photocopied the Hunter letter. Mr. McInnes, who did not testify, was the only other person who knew the truth about the Hunter letter, according to Mr. Hunter. Mr. Hunter explained that he did not use the original letter because employees might think it did not apply to the Great West Timber situation; he did not reproduce some of its contents in a leaflet under his own name (or, presumably, that of Mr. McInnes) because that would not have the same impact as a legal opinion; he did not seek another opinion specifically relating to Great West Timber because he thought the CPU owned the original letter, it had paid for it and could do as it wished with it and because, he said (after slight prompting by counsel for the CPU), he and, we assume, Mr. McInnes "panicked" as the date of the vote approached. We find it hard to credit Mr. Hunter, who has had approximately sixteen years experience in union office at different levels, with such naivete. Mr. Hunter said that he did not think

he was doing anything "wrong". He now appears to appreciate that what he did is indefensible from any ethical perspective.

8. Counsel for Local 2693 made much of the fact that the signature on the Hunter letter appeared to be that of Douglas Wray. Mr. Wray has connections both to the CPU and Local 2693. In 1985, the Ontario government appointed the Rosehart Commission to make inquiry into the closing of the Great Lakes Flake Board Plant in Thunder Bay. When it appeared that the unions involved would be unable to see certain confidential documents, it was proposed that a lawyer chosen by the unions represent them in connection with the Rosehart Commission. The CPU proposed Mr. Wray and Local 2693 agreed; Mr. Wray represented in addition the International Brotherhood of Electrical Workers. Mr. Wray had never acted for Local 2693 as legal counsel in other matters, but was the CPU's lawyer. Counsel for Local 2693 argued that the presence of Mr. Wray's name on the letter would have had the effect of making the employees believe Mr. Wray had taken sides in this dispute. Mr. Hunter explained that it was just chance that Mr. Wray's signature, and not someone else's from Caley and Wray, appeared on the letter he had fabricated. Mr. Haapa testified he did not know who Mr. Wray was. The important factor for him was that it was a lawyer's letter. We are not convinced that the fact that the signature on the Hunter letter was that of Mr. Wray was fortuitous. Nevertheless, we are also not convinced that it was as significant as Local 2693's counsel would have us believe. Fred Miron, President of Local 2693, explained that there was already a feeling among the employees that he had lied about the effect of a displacement of Local 2693 by the CPU as the bargaining agent of the employees at Great West Timber, and then there was a letter from a lawyer he had previously said he respected (in connection with the Rosehart Commission) which seemed to confirm that he was a liar. He himself "took the letter as gospel", but also said it was "beyond [him] why [Mr. Wray] had been so positive" (this relating to the omissions in the Hunter letter of material in the original letter which made the opinion in the Hunter letter incomplete). But there is no evidence Mr. Wray had the same effect on employees choosing between the CPU and Local 2693. The fact that the signature was that of Mr. Wray is therefore, in our view, merely one element of the entire fabrication and we do not consider that it had any particular effect in itself.

9. The Hunter letter is obviously a "forgery". Counsel for Local 2693 stressed that the Hunter letter constituted a forgery within the meaning of section 324 of the Criminal Code and a fraud within the meaning of section 355 of the Criminal Code. We are not required to make such a finding in order to determine whether this is a case to which section 58 or section 106 applies. The Board makes findings with respect to allegedly criminal matters only when it is necessary to do so to make decisions within the labour relations jurisdiction of this Board. Even a contravention of the Criminal Code does not extend the role of this Board as it has been defined in its jurisprudence. The issues before the Board, however, are whether the use of the letter constitutes fraud within the meaning of section 58 of the Act and whether it warrants our exercising our discretion to reconsider in such a manner that we revoke the CPU's certificate or, as alternatively requested by counsel for Local 2693, order a new vote in which the CPU would not participate.

10. Section 58 of the Act provides as follows:

If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.

Fraud within the meaning of section 58 has consistently been interpreted to mean "fraud upon the Board": "it must be demonstrated that a false representation was made to the Board which the

Board relied on and also that the representation was known, or ought reasonably to have been known by the purveyor thereof to be false” (*Ontario Taxi Association 1688*, [1981] OLRB Rep. Sept. 1280, at paragraph 19). The “representation” in the case before us is that the Hunter letter was written by Mr. Wray, or, at least, by a lawyer and had been written for the Great West Timber situation. Mr. Hunter knew that was not the case. However, the Hunter letter was not before the Board when it certified the CPU; it played no part at all in the Board’s decision to certify the CPU, a decision based entirely on the outcome of the vote held on August 28, 1986. In our view, section 58 does not apply to the circumstances of this case.

11. We turn now to our power to reconsider our decision to certify the CPU. Counsel for the CPU submitted that Local 2693’s allegation is, and should be treated as, a delayed representation under section 70(2) of the Board’s Rules and Procedures. Since Local 2693 did not know about the “forgery” until sometime after the vote, it could not make an objection in the normal course, but made it subsequently as a request for reconsideration. We believe this characterization is correct and therefore apply the general principles applied in cases in which there has been an objection to a vote (in the case of a pre-hearing representation vote, under section 70(2)).

12. The Board has often made it clear that it will not involve itself in certification campaigns, except under limited circumstances. In *Cara Operations Limited*, [1985] OLRB Rep. Feb. 222, the Board stated at paragraph 17 that “it is not our function to assess whether the statements are false, misleading, unfair, defamatory or whether the propaganda campaign has been conducted fairly by both sides. Rather, we must decide whether the letter in this case has deprived the employees of the ability to exercise their ‘critical faculties’ in assessing whether the respondent should continue to represent them in collective bargaining”. (Also see *Carlton Cards Ltd.*, [1985] OLRB Rep. Sept. 1352; *Stauffer-Dobbie Manufacturing*, 59 CLLC ¶18,147.) In *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19, the Board indicated at paragraph 8 that it “does not normally interfere with a vote preceded by propaganda which is speculative, exaggerated, misleading or even false”.

13. The Board recognizes that “[i]n determining the impact on the voters of the literature complained of, it is of course obvious that it is rarely, and perhaps never, possible to determine objectively what effect it has actually had” (*Stauffer-Dobbie Manufacturing*, *supra*). In this case, the fact that the letter was forged or fabricated was not known by any employees until after the vote. Mr. Haapa testified that he first heard about it on television after the vote. The contents of the Hunter letter, which *were* before the employees, or some of them, prior to the vote, are not in issue. Local 2693 did not file a desire to make representations with respect to the conduct of the vote as a consequence of the distribution of the letter; and its counsel admits the contents do not constitute a ground for complaint or objection. As Mr. Miron said, “a campaign is a campaign”. The contents of the letter by themselves, even over Mr. Wray’s signature, were not considered by Local 2693 to be of a sort which would prevent the free desires of the employees being determined in a secret vote (*Stauffer-Dobbie Manufacturing*, *supra*) or which would deprive the employees of the ability to exercise their critical faculties (*Cara Operations Limited*, *supra*).

14. Counsel for Local 2693 is really asking the Board to “punish” the CPU for the forgery perpetrated by one of its representatives. Indeed, he urged the Board to depart from its normal practice to do just that. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at paragraph 94, the Board made it clear that its role is not to penalize parties: “By implication, [from the language of then section 85, now section 96] and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section [89] with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment”. We have not

found a violation of the Act. Even if we had, regardless of how poorly we might look upon Mr. Hunter (and by inference, the CPU) for distributing a letter, a professional opinion, without the permission of the individual whose name appears as signatory, an individual who did not write the letter even in its original form, we do not have the discretion to punish any party before us.

15. For the foregoing reasons, we decline to revoke the CPU's certificate or to order another vote, with or without the participation of the CPU.

1216-86-U Howard J. Howes, Complainant, v. United Steelworkers of America, Local 8222, Respondent, v. Duomatic Olsen Inc., Intervener

Duty of Fair Representation - Unfair Labour Practice - Refusal to file discharge grievance because union thought requested remedy was inappropriate constituting arbitrary conduct - Declaration of breach of Act sole remedy

BEFORE: *Ken Petryshen*, Vice-Chairman.

APPEARANCES: *Howard Howes* and *Marilyn Kemble* for the complainant; *Brian Shell* and *Bill Lloyd* for the respondent; *Steven McCormack*, *William Madigan* and *Al Steinfeld* for the intervenor.

DECISION OF THE BOARD; January 29, 1987

1. The name of the complainant is amended to read: "Howard J. Howes".
2. This is a complaint made under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent contravened section 68 of the Act. Mr. Howes claims that the union acted in a way that was arbitrary, discriminatory and in bad faith when it settled his discharge grievance #86-601 (first grievance) and in the manner in which it handled a second discharge grievance #86-111 (second grievance).
3. The hearing in this complaint was held on September 29, 1986. Mr. Howes testified in favour of the complaint and Mr. N. Carriere was called to testify by counsel for the union. Having weighed and assessed the evidence, including the credibility of the witnesses, the Board makes the following findings of fact.
4. On January 24, 1986, Howes, a member of the Health and Safety Committee, was advised that the employer terminated the health and welfare benefits of Ted Forman, an employee in the bargaining unit. Howes was quite concerned about this matter and in discussing his concerns with management, he advised employer representatives that the situation was serious and that employees could walk out. In the early afternoon of January 24, 1986, Howes, along with three other employees, began picketing the employer's premises. Howes continued to engage in picketing activity on the following day. Howes testified that he did not encourage anyone to join him in his picketing activity and that anyone who did picket did so entirely on their own volition. The four employees were suspended pending an investigation and by letter dated January 31, 1986, Duomatic Olsen Inc. (the employer) advised Howes that it was terminating his services effective January 24, 1986 as a result of his actions "in condoning, encouraging, supporting and/or instigating an

illegal strike and picketing the premises of the plant". Of the other three employees who engaged in picketing activity, one was terminated and the other two were given twenty day suspensions. Howes prepared a grievance challenging his discharge which the union filed with the employer. The union also filed grievances on behalf of the other disciplined employees. At Howes' request, the union permitted Marilyn Kemble to act as steward in the processing of the four grievances. By early April 1986, the respondent had referred the grievances to arbitration, an arbitrator had been selected and it was expected that an arbitration hearing would be scheduled for September, 1986.

5. While awaiting the arbitration of his discharge grievance, Howes had occasion to attend at the employer's premises on May 15, 1986. On that occasion, Howes assaulted Mr. A. Steinfield, the Personnel and Industrial Relations Manager, by spitting in his face twice. Howes admits he engaged in this conduct and when asked whether he was prepared to apologize to Steinfield, Howes testified he was not prepared to do so.

6. On May 29, 1986, Norman Carriere, a District Staff Representative for the United Steelworkers of America, interviewed Howes and the three other employees who were disciplined for striking and for picketing activity. It appears that Bill Lloyd, the respondent's representative who services the employer's employees, and Joe Brown, the President of Local 8222, sought Carriere's assistance with respect to resolving the outstanding discipline grievances. Carriere, who has extensive arbitration experience, reviewed Kemble's detailed notes made during the processing of the grievances, as well as Lloyd's files. When interviewing the grievors, Carriere explained he was not very optimistic and proceeded to obtain information from the grievors which they considered to be relevant to their grievances. After conducting his investigation, Carriere concluded that the four employees had engaged in an illegal strike and he felt that the best he could achieve at arbitration would be the reinstatement of the two employees who were discharged. Carriere considered the fact that two of the grievors were discharged while the other two were merely suspended, but was satisfied there was some justification for the different treatment since the discharged employees engaged in picketing for more than one day.

7. On June 3, 1986, Carriere and Lloyd met with employer representatives in the hope of settling the four discipline grievances. At the conclusion of this meeting, Carriere was satisfied Local 8222 could resolve all four grievances with the reinstatement of the discharged employees and the substitution of a suspension without pay, but without loss of seniority. Since the employer representatives did not have the authority to settle the grievances, the actual settlement of the grievances was left for a later time. During their discussions, an employer representative made reference to the Howes' spitting incident and he indicated that the employer was not taking it lightly. Carriere and Lloyd, although aware of the spitting incident, concentrated on the task at hand, namely the resolution of the four discipline grievances.

8. On the evening of June 10, 1986, Brown called Howes to advise him that union representatives would be meeting with management the next day to settle the four discipline grievances. When Howes asked what would happen, Brown indicated he could not be certain, but one possibility would be that Howes' discharge would be changed to a suspension and he would not receive any back pay. Howes expressed concern about receiving no back pay since he had been off work for some time. When Howes asked Brown about the spitting incident, Brown responded by saying that management did not mention it to him and he did not intend to raise it.

9. On the morning of June 11, 1986, Local 8222 and the employer executed Minutes of Settlement which provided for the resolution of the four grievances along the lines anticipated by Carriere. At approximately 10:30 a.m. on that morning, Brown called Howes to advise him of the terms of the settlement and to tell him he would return to work on the following day. Shortly after

the discussion with Brown, Howes received two letters from the employer. One of the letters amended the discharge letter of January 31, 1986, in order to conform to the terms of the settlement. The second letter, dated June 11, 1986, advised Howes he was terminated for spitting twice in Steinfeld's face and for encouraging Steinfeld to come outside. Howes immediately called Brown, read him the discharge letter and asked Brown what was going on. Brown's response to what Howes told him indicates that Brown was unaware that the employer intended to discharge Howes for the spitting incident. Brown advised Howes to grieve the discharge and that he would discuss the matter with Lloyd.

10. On June 12, 1986, Howes met with Don Graham, the Recording Secretary and a member of the grievance committee for Local 8222, and prepared a grievance challenging his discharge for the spitting incident. In this second grievance, Howes insisted on a remedy which included compensation for a period of time beginning from January 24, 1986, the date when his suspension for participating in the strike and the picketing activity commenced. On June 13, 1986, Brown called Howes to advise him that his grievance was no good and that he would have to come in and rewrite it. Brown told Howes that he could not file his grievance as it was written since the employer would not accept it given the requested remedy. Howes indicated to Brown that he would get back to him as to whether he would rewrite the grievance or not.

11. Howes called a friend for advice. The friend, a Canadian Auto Workers Local President, suggested Howes leave the grievance as it stood. Rather than call Brown himself, Howes asked Kemble to call Brown and advise him about his decision on the grievance. Kemble, with Howes present, called Brown and told him that the grievance stands as written and asked Brown what his position was. Howes testified that Kemble advised him that Brown responded to her question by saying that he would not hand the grievance in until he talked to Bill Lloyd and that he would get back to Howes. Since Kemble did not testify, Howes' evidence of what Kemble told him about what Brown said to her is hearsay, as noted by counsel for the union. What is clear from Howes' evidence is that Brown was advised that Howes wanted Brown to file the second grievance as written and that Howes understood that Brown would get back to him regarding Local 8222's decision on his grievance.

12. The next conversation between Howes and Brown took place July 8, 1986, approximately three weeks after Brown was told to file the grievance as it was written. The relevant collective agreement provides that a grievance of this type shall be filed in five days. Howes indicated that he attempted to call Brown at the plant on a number of occasions but was not successful in contacting him. I am satisfied that other ways were available to Howes to contact Brown, which Howes failed to take advantage of. But even if Howes could have done more in order to stay on top of the situation, this alone cannot provide a defense to the union for its conduct in handling Howes' second grievance.

13. As a result of information he received from another employee, Howes called Graham on July 8, 1986, and asked Graham about the status of his grievance. Graham advised Howes that Brown vetoed his grievance because of the requested remedy without bringing the grievance to the grievance committee. Howes made a comment about complaining to the Ministry of Labour and asked Graham to have Brown call him. Brown called Howes on July 9, 1986, and responded to Howes' question about the status of his grievance by saying that he did not have a grievance. When Howes replied that he did have a grievance, Brown advised him that he had dropped his grievance and confirmed that he did not present the grievance to the grievance committee. When Howes asked for all of the documentation relating to his grievance, Brown indicated that he had been advised not to give him anything and, if Howes did not like it, he could charge him.

14. This complaint was dated July 14, 1986 and was filed with the Board on July 17. Subsequent to the filing of the complaint, the respondent filed Howes' second grievance with the employer and processed the grievance in accordance with the terms of the collective agreement. During a third step grievance meeting, Lloyd argued that the employer should reduce the penalty. Although Howes expressed some concern about the way in which the union argued his case at the third step meeting, I am satisfied, based on what Howes said took place, that the union provided Howes with satisfactory representation at the third step meeting. The respondent was successful in obtaining the employer's agreement to waive any time limits which may have applied to the second discharge grievance. Local 8222 has requested a solicitor to provide it with an opinion as to whether or not the Local should proceed to arbitration with Howes' second grievance. As of the hearing date for this complaint, the respondent had not decided whether it would arbitrate Howes' second grievance since it had not received its solicitor's opinion on the merits of the grievance, and this was in large part due to Mr. Howes' failure to keep an appointment to meet with the Local's solicitor.

15. In his submissions to the Board, Howes argued that Local 8222 contravened section 68 of the Act in two respects. He claimed the Local contravened the section when it settled the first discharge grievance without raising the spitting incident with the employer. While he was testifying, Howes was asked whether he would have made a complaint concerning the way in which Local 8222 settled his first grievance if the employer did not fire him for the spitting incident, and he answered by saying he would not have made a complaint. Nonetheless, Howes argued that the union represented him unfairly in settling his first discharge grievance. Howes also argued that the union contravened section 68 in the way it handled his second discharge grievance, particularly when it elected to drop the grievance without filing it with the employer. Howes requested the following remedies for the alleged violations:

- (1) that the Board declare the settlement of the first grievance null and void and that the complainant be compensated for his losses from January 24, 1986 until June 11, 1986, less twenty days for which he would have had to serve as a suspension;
- (2) that the Board direct the respondent to take his second grievance to arbitration allowing the complainant to select his own legal advisor at the union's expense; and,
- (3) that the Board direct the union to pay for the complainant's costs incurred on September 29, the hearing day.

16. Section 68 of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

17. Subject to the duty set out in section 68 of the Act, decisions concerning how grievances will be settled or whether a particular grievance will proceed to arbitration are matters which are exclusively decided by the trade union. The Board has not interpreted section 68 in a way which requires a trade union to arbitrate a grievance or to settle a grievance in a particular way merely to accommodate a grievor's wishes. The duty only requires that in deciding such matters, the trade union is obliged to act in a manner which is not arbitrary, discriminatory or in bad faith. In *Savage*

Shoes Ltd., [1983] OLRB Rep. Dec. 2067, the Board comments on the nature of the obligation found in section 68:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at this decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking processes hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be "reasonable" (*Clifford Renaud*, [1976] 2 Can. LRB, [1976] OLRB Rep. Jan. 967, ¶22; *Jay Sussman*, [1976] OLRB Rep. July 349 ¶11; *I.T.E. Industries Ltd.* [1980] Rep. July 1001, ¶20), "not unreasonable" (*Ivan Pletikos* [1977] OLRB Rep. November 776, ¶3), "not open to challenge" (*Oil Chemical & Atomic Workers Int'l Union and its Local 9-698*, [1972] OLRB May 521, ¶3), or at least "not implausible" (*CUPE Local 1000 - Ontario Hydro Employees Union*, [1975] May 444, ¶32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers "patent" and arrives at an "almost perverse" understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from "directing its mind to the real question", and that in so doing it has acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, ¶22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *CUPE Local 2327*, [1981] OLRB Rep. June 623, ¶30; *Alvin Plummer*, [1983] OLRB Rep. Nov. 1920, 5 CLRBR (NS) 108.

18. Many section 68 complaints are concerned with situations in which the trade union elects not to proceed to arbitration with a discharge grievance. In *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, the Board made the following observations about a trade union's duty in such cases:

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions give discharged employees an absolute right to have their terminations reviewed at arbitration. (See *Division*

V.7 (Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C., 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, P. *Reconcilable Differences*, (1980) pp. 137 ff.). In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

41. This Board does not view the language of section 68 of the Act as guaranteeing to every employee the arbitration of his or her discharge...

• • •

46. ... In our view, however, the law has evolved beyond the point where the union may simply assert that it has "considered" an employee's request for help and "decided" not to help him.

47. The decision not to process a grievance for an employee who has been disciplined or discharged may, depending on the circumstances, be a justified and responsible exercise of a union's prerogatives. Where, however, an employee has been discharged there is an obligation on a union to provide a satisfactory explanation for its decision not to process a grievance. While the legal burden in a section 68 complaint is on the individual complainant, *once it is established that a union member has suffered the ultimate sanction of discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration.*

[emphasis added]

19. The evidence discloses that various representatives of the union were involved in thoroughly investigating the circumstances giving rise to the discipline imposed by the employer on all of the employees who were alleged to have engaged in illegal strike activity. At the complainant's request, the respondent allowed Ms. Kemble to act as steward for the grievors and she was able to provide other union representatives with extensive notes detailing the results of her investigation. The union treated the grievances seriously and this is reflected by the fact that it sought out the assistance of Carriere, a District Staff Representative. Carriere also investigated the grievances thoroughly by reviewing the file, Kemble's notes and by interviewing all of the grievors, including Howes. After investigating the circumstances, Carriere engaged in settlement discussions with representatives of the employer and eventually a settlement was reached which resulted in the reinstatement of Howes and the other discharged employee. In Carriere's view, the union would not likely have achieved a better result at arbitration.

20. Carriere and the other union representatives were not dealing with the imposition of discipline on the complainant as a result of the spitting incident. They were providing representation to employees who were disciplined for allegedly striking illegally. It would not be unreasonable for the union representatives to view the spitting incident as a matter extraneous to the grievances they were attempting to settle. In addition, referring to the spitting incident while attempting to settle the discipline grievances could have seriously damaged the likelihood of reaching a settlement. Not only would Howes' return to work be jeopardized, but the return to work of the other discharged employee would also be jeopardized, since this was obviously a situation where there would either be a settlement of all grievances or no settlement at all. In electing to settle Howes' first discharge grievance without raising the spitting incident, the union made a judgement which, in these circumstances, the Board is not prepared to second guess. In reviewing the respondent's representation of Howes with respect to his first discharge grievance, the Board is satisfied that the respondent did not contravene section 68 of the Act. Therefore, that aspect of the complaint which concerns the respondent's handling of Howes' grievance #86-601 is hereby dismissed.

21. Counsel for the respondent argued that Brown's refusal to file Howes' second discharge grievance because of the requested remedy may have been an error on his part, but should not lead the Board to conclude that Brown's conduct was arbitrary, discriminatory or motivated by bad faith, even though Brown did not testify and explain why he initially decided not to process Howes' second grievance. In the circumstances of this case, the Board has difficulty in accepting this proposition. It is not uncommon for grievors to request remedies which, for various reasons, may not be appropriate. The fact that a grievor seeks an inappropriate remedy does not obligate the trade union to pursue such a remedy when it processes the grievance. The refusal to file a grievance, particularly a discharge grievance, merely because the trade union official feels that the requested remedy is inappropriate, has the appearance of being arbitrary. An explanation from the trade union official as to why he or she acted in this way ultimately may lead the Board to conclude that there has not been a contravention of section 68 of the Act. For example, in this case, Brown may have been concerned that filing the grievance as written may have damaged the bargaining relationship between the union and the employer since the grievance was inconsistent with the settlement of Howes' first discharge grievance. Such an explanation may have led the Board to conclude that Brown's conduct, although appearing to be arbitrary, was in fact not arbitrary. Since we had no explanation from Brown in circumstances where an explanation is required, the Board is left to conclude that Brown's conduct was arbitrary within the meaning of section 68 of the Act.

22. After Brown asked Howes to rewrite his second discharge grievance, Brown was advised by Kemble on June 13, 1986 that Howes wanted the grievance filed as written. Howes understood that Brown would get back to him and advise him whether he would file the grievance as written. Even if Howes' understanding was incorrect, the Board is left with no direct evidence concerning Brown's response to Howes' request to file the grievance as written. The next piece of evidence relating to Brown deals with the telephone conversation on June 13, 1986 between Howes and Brown where Brown advises Howes that he dropped his grievance. Brown's failure to give Howes the opportunity to rewrite his second discharge grievance with the knowledge that Brown was not going to file the grievance as written is arbitrary within the meaning of section 68 of the Act.

23. In the result, the Board is compelled to conclude on a review of the evidence and argument, and so declares, that the respondent contravened section 68 of the *Labour Relations Act* by acting in an arbitrary manner in the representation of the complainant when it initially dealt with his second discharge grievance.

24. The Board is satisfied that the only remedial response which is warranted in the circumstances of this case is a declaration. The essence of Howes' complaint as it relates to the second discharge grievance is that the respondent initially abandoned the grievance without even filing it with the employer. In order to remedy a contravention of section 68 arising on these facts, the Board would be inclined to direct the union to file the complainant's grievance and to process it in accordance with the grievance procedure provisions of the collective agreement and its obligations under section 68 of the Act. The evidence discloses that as of the date of hearing, this is precisely what the respondent has done. The respondent has filed Howes' second discharge grievance, processed it in accordance with the terms of the collective agreement and obtained the agreement of the employer to waive any objection based on time limits. Howes was provided with satisfactory representation at the third step meeting and the union has requested a legal opinion from its solicitor concerning the merits of Howes' second discharge grievance. From the time the grievance was filed to the date on which this complaint was heard, the respondent has represented Howes in accordance with its obligations under the Act, and there is no evidence before the Board which would indicate that the union will be unlikely to continue to satisfy its obligations under section 68 of the Act. In this connection, the Board notes that Brown was not opposed to filing another discharge

grievance for Howes, but rather only had concerns with respect to the particular remedy which Howes wished to request in his second discharge grievance, part of which remedy was inconsistent with the settlement which the union had entered into regarding Howes' first grievance. In addition, it is worth noting that the way in which the respondent represented Howes on the first discharge lends support to the proposition that there is little basis on which one could infer that the respondent will likely neglect its statutory duty in continuing to represent him on the second discharge. Thus, the circumstances would not prompt the Board to direct the respondent to arbitrate the second discharge grievance. Since the respondent has already implemented the action which the Board would have ordered it to take, no relief other than the foregoing declaration is necessary or appropriate in the circumstances of this case.

25. The Board has uniformly denied requests for costs in the context of a successful section 68 complaint. (See, for example, *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401.) Since there is no reason to depart from its usual approach on the facts of this case, the Board denies the complainant's request for his costs incurred on September 29, the date of hearing.

0201-86-M Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Applicant, v. J. H. Lock & Sons Limited, Respondent

Construction Industry Grievance - Grievor mechanic laid off and not recalled - Explicit requirement in collective agreement that employer exercise its rights in a fair and reasonable manner - Board finding contravention of collective agreement but recall or seniority rights not to be read into "fair and reasonable" clause

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *M. A. F. Stockton* and *P. J. O'Keeffe*.

APPEARANCES: *L. Steinberg*, *J. Carricato* and *M. Sumka* for the applicant; *Brian Burkett* and *Walter Enns* for the respondent.

DECISION OF THE BOARD; January 5, 1987

1. This is a reference under section 124 of the *Labour Relations Act* ("the Act").
2. By decision dated June 16, 1986, we disposed of certain preliminary matters raised by the respondent. The hearing into the merits occurred on November 12, 1986.
3. In this referral, Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("the union" or "Local 787") alleges that J. H. Lock & Sons Limited ("J. H. Lock" or "the company" or "the employer") contravened the collective agreement between the union and the employer when it laid off Michael Sumka, the grievor herein, and did not recall him. Specifically, the union argues that the employer failed to exercise its management rights over hiring and over determining the number of employees it required in a "fair and reasonable" manner, as required by the collective agreement. Alternatively, the union alleges that the failure to recall Mr. Sumka is tantamount to dismissal without just cause.

4. Mr. Sumka began working for J. H. Lock on September 1, 1949 and worked there until he was laid off in January 1985. He served his apprenticeship as a refrigeration mechanic with the respondent, becoming a journeyman and on occasion a foreman on a project. For thirty years, the job was more or less steady; however, beginning in 1979, there was less work available and he was laid off for increasing periods, but never for more than a few weeks. Sometimes mechanics with less service would be kept on when Mr. Sumka was laid off. He was always recalled. A pattern of layoff and recall was established and followed for five or six years until January 1985.

5. In January 1985, Mr. Sumka was employed on a project at Molson Brewery. About the middle of January, Alan Campbell, the Ontario Regional Manager for J. H. Lock, told Mr. Sumka that there was a shortage of work and he would be laid off. He also told Mr. Sumka that if any work came up, he would call Mr. Sumka back.

6. Mr. Sumka maintained regular contact with Mr. Campbell and with Doug McNinch, then President of J. H. Lock, who subsequently left the company the following November. He made sure they knew he was interested in work and they continued to assure him he would be recalled when there was work. When he had not been recalled at the end of January, Mr. Sumka called the union. In March, he was offered a chance by the union to go to a project at Carling O'Keefe with a company called Black and MacDonald. (It might be noted here that while the union does operate a hiring hall, workers can call employers themselves for work, as Mr. Sumka did.) Before he took the job, Mr. Sumka visited Mr. McNinch to let him know that the Carling project was temporary and that he was still interested in J. H. Lock. Mr. McNinch told him there would be 'no problem' with his returning to J. H. Lock. More or less the same conversation took place between Mr. Sumka and Mr. Campbell.

7. A week after Mr. Sumka began the Carling O'Keefe project, he received his separation papers from J. H. Lock, with a note attached saying he had "quit". Mr. Sumka called his union and Mr. McNinch who was, he says, "a little dumbfounded". Mr. McNinch said he would look into the matter. Joe Carricato, the business manager of Local 787, testified that Mr. McNinch told him it was an internal error and "we know he [Mr. Sumka] was laid off, don't worry".

8. After being laid off the Carling O'Keefe project in mid-July, Mr. Sumka again contacted Mr. McNinch to confirm that his staying at Black and MacDonald would not raise problems about his returning to J. H. Lock. Sometime around August 1, 1985, he was laid off from Black and MacDonald and went to see Mr. Campbell who told him that he would call Mr. Sumka back after he had other men working and as a new employee. Although Mr. Sumka did not understand this shift in the company's perception of his status (one which Mr. Campbell does not appear to have raised again), he did not question it for fear of alienating Mr. Campbell. In September or October, he was again told by Mr. McNinch and Mr. Campbell there would be work for which he was "suitable" coming up and that there were a couple of likely jobs in Hamilton ("the skating rink projects"). In fact, he was never called for those jobs.

9. The work undertaken by J. H. Lock varies from two or three-day jobs to small projects of less than two weeks to large projects which might last months. According to Mr. Carricato, it was understood that Mr. Sumka was a good worker on the right project, that is, the longer projects. It took him some time to "set up" when he started a job and therefore was not an appropriate choice for two to three-day jobs. For that reason, it was necessary to wait for large projects for which Mr. Sumka was suitable.

10. Mr. Carricato indicated that the union had had some discussions with the company in June or July about the care of older workers and the suitability of older mechanics for various projects. Mr. Sumka's name often figured in these discussions. On one occasion, a travel card person

(a member of another local of the same union) was given work on a project that Mr. Carricato thought would be appropriate for Mr. Sumka. Mr. Campbell explained that this individual ("Heinz") was actually doing service and repair work which Mr. Sumka preferred not to do. But by the fall of 1985, it became apparent that the company did not intend to recall Mr. Sumka when he was not recalled on the two skating rink projects in Hamilton.

11. Finally, in February, the union filed the grievance which has been referred to the Board. Mr. Todd, who had been laid off at the same time as Mr. Sumka, was recalled on the skating rink project in Hamilton. Mr. Campbell explained that the job was connected with the Guelph operation and Mr. Todd lived in Guelph. Mr. Carricato was not satisfied with this explanation. He visited the project in February 1986 and saw not only Mr. Todd, but also Heinz, who was doing construction, not service, work. There now seemed no doubt that Mr. Sumka would not be recalled.

12. Article 5:01(c) of the Collective Agreement between the union and Local 787 is a "management rights" article containing the following provisions relevant to this grievance:

5:01(c) Subject to the express terms of the Collective Agreement and specifically to Article 8 Paragraph 8.03(a) and (b), the Union recognizes the right of the Employer to operate and manage his business in accordance with his commitments and responsibilities.

The following are solely and exclusively the responsibility of the Employer:

• • •

- (5) The right to decide on the number of employees needed by the Company at any time.
- (6) The control of all operations and buildings, machinery and tools owned or rented by the Company. The direction of the employees, including the right to hire, suspend or discharge for proper cause and the right to relieve employees from duty because of lack of work or other legitimate reasons is vested exclusively with the Employer subject to this Collective Agreement and in particular, subject to the grievance and arbitration procedures provided herein.
- (7) The Employer agrees that in the exercising of its management rights and in the administration of this Agreement, it shall do so in a fair and reasonable manner.

13. Counsel for Mr. Sumka argues that the employer did not exercise its rights under sections (5) and (6) of Article 5:01(c) in a "fair and reasonable manner", as required by section (7) of Article 5:01(c). Alternatively, he argues that Mr. Sumka was discharged without cause.

14. Counsel distinguished the refrigeration industry from the construction industry generally by its long-term relationship with a core group of employees who, although laid off, would always be recalled. More particularly, counsel submits, this was the nature of the relationship between Mr. Sumka and J. H. Lock, one more reflective of the industrial context than the construction setting. Alternatively, he says, the indefinite duration of this layoff transforms the layoff into a discharge and the employer is obligated under those circumstances to show just cause for Mr. Sumka's dismissal.

15. Counsel for J. H. Lock strenuously argued that this is a construction case and that the grievance, by bringing industrial setting concepts into the construction model, is misconceived. The ICI agreement governing the parties has no recall or seniority rights. Moreover, counsel cautions,

such rights must not be read into the agreement through the “fair and reasonable” clause. Once Mr. Sumka was laid off, his relationship with J. H. Lock was at an end and the company had no further obligation towards him. To conclude that Mr. Sumka had a right of recall would effectively amend the collective agreement to include provisions about how employees are to be recalled, an object better sought through negotiations between the union and company than through a decision of this Board. Furthermore, such a principle would have prospective value; yet the company would have no guidelines in applying it to future cases. Counsel submits that moral outrage about the treatment of the long-term employee is not encompassed by the collective agreement or this industry.

16. Counsel for J. H. Lock referred us to *Re Columbia Bitulithic Ltd. and International Union of Operating Engineers, Local 115* (1977), 17 L.A.C. (2d) 47. In *Re Columbia Bitulithic*, the grievor was injured while employed by Columbia Bitulithic. While he was on compensation, the company ceased operations; when it began operation again, it requested employees through the union hiring hall, but did not “name request” the grievor. The grievor alleged he had been dismissed without just cause. The grievance was dismissed because there was no obligation on the part of the company to recall the grievor once operations ceased; at that point, he was in the same position as any laid-off employee. That case is distinguishable from the one before us since there was no “fair and reasonable” provision in the collective agreement.

17. The company does not deny that Mr. Sumka was told repeatedly that he would be recalled when a suitable project was available. Nor does it deny that the skating rinks (and perhaps earlier unspecified projects) were suitable. The company brought no evidence at all and thus offered no explanation of why Mr. Sumka was treated as he was. We are left, then, only with the union’s evidence. That evidence reveals an employee who has for all intents and purposes worked for the same company for thirty-six years, who has always recognized and accepted the employer’s right to assign workers as it considers appropriate and “to relieve employees from duty because of lack of work”, and who believed the employer’s representatives when they assured him over and over again that they would recall him. Mr. Sumka worked during this period because he wanted to work but he always affirmed his preference to return to J. H. Lock - and J. H. Lock consistently affirmed that he would be able to do so.

18. Having considered the evidence and counsels’ submissions, we find that Mr. Sumka is entitled to compensation from the employer for its treatment of him, arising out of its contravention of the collective agreement.

19. Our decision is based solely on the company’s obligation *under the collective agreement* to exercise its rights in a fair and reasonable manner. In our view, its continued assurances to Mr. Sumka, because they were inconsistent with its actual conduct, showed a serious lack of regard for Mr. Sumka as an individual and as an employee, particularly (but not only) an employee of long standing. Fairness requires that an employer be as straightforward with employees as possible. Put colloquially, it requires that an employer let an employee know where he or she stands. Where an employer is not going to recall an employee, the employer should not lead the employee to believe that he will be recalled. On the evidence before us, it appears that at some point the company made up its mind not to recall Mr. Sumka. But instead of telling him that, he was told by Mr. Campbell that if he wanted to come back it was as a new employee (and we have no evidence to suggest that such an assertion was reasonable, given the past practice) and by Mr. McNinch (and again by Mr. Campbell) that he would be recalled as usual.

20. In reaching this conclusion, we emphasize that we are not reading into the collective agreement any right of recall or any seniority provisions. We note also that the discussion in *Re*

York University and York University Faculty Association (1980), 26 L.A.C. (2d) 17, in which it was said that “the duty to act fairly is obviously set in the context of the particular agreement governing the employment relationship and takes its meaning, at least in part, from the terms of that agreement” refers to agreements in which there is not an explicit requirement that the employer exercise its rights in a fair and reasonable manner. An arbitrator cannot use the question of fairness to rewrite or re-interpret the collective agreement where the agreement contains an explicit provision relating to the issue before the arbitrator. Again, we have not employed a general “duty to act fairly” principle to “rewrite” the collective agreement between J. H. Lock and the union, but have merely interpreted the agreement on its own terms. We agree with the Board in *Consolidated Maintenance Services Limited*, [1978] OLRB Rep. July 602, that it would be improper for the Board to read into the agreement a provision which has not been included by the parties. However, we are not in this case reading into the collective agreement a right of recall or any seniority provision. Nor is it necessary for us to reach any conclusion about the particular nature of this aspect of the construction industry and we do not do so. We rely only on the application of Article 5:01(c)(7) to the uncontradicted evidence before us. We do not find that Mr. Sumka had a right to be recalled. We do not find that the length of his service by itself gives him any priority over other employees. We find only that the way Mr. Sumka was treated by the company was not fair and that therefore the company has contravened the collective agreement.

21. In light of our conclusion, it is not necessary for us to rule on the union’s alternative submission that Mr. Sumka was unjustly discharged.

22. Mr. Sumka does not seek reinstatement. We order that he be compensated for the company’s failure to abide by Article 5:01(c)(7). We remain seized of this matter should the parties be unable to reach agreement on the appropriate amount of compensation.

2082-86-FC Ontario Public Service Employees Union, Applicant, v. Juvenile Detention (Niagara) Inc., Respondent

First Contract Arbitration - COMSOC providing funding to respondent non-profit juvenile home - Union submitting that bargaining impasse resulted from COMSOC’s unwillingness to increase funds for wages - Board unable to find that bargaining had been unsuccessful - Room available for further discussion, clarification and compromise - Application dismissed

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *I. M. Stamp* and *J. J. Redshaw*.

APPEARANCES: *G. Richards*, *G. Rodger*, *J. Osczyk* and *K. Weir* for the applicant; *P. Young*, *D. Francis* and *W. Charron* for the respondent.

DECISION OF THE BOARD; January 12, 1987

I

1. This is an application under section 40a of the *Labour Relations Act* which came into force on May 26, 1986. The relevant provisions of section 40a are as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has

released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

The applicant union relies upon subsection 40a(a)(b) and subsection 40a(2)(d). The union contends that the process of collective bargaining has been unsuccessful, in part, because of the uncompromising nature of the bargaining positions adopted by the respondent, on wages and other issues, without reasonable justification. More fundamentally, the union claims that the collective bargaining process has been confined, inhibited, and ultimately stifled by the constraints imposed upon it by the Ministry of Community and Social Services, which supervises and funds the respondent's activities. The union asserts that those institutional constraints on the bargaining process warrant an exercise of the Board's discretion under section 40(a)(2)(d).

2. A hearing in this matter was held in Toronto on November 12, 1986. At that hearing, the Board heard extensive submissions on the course of the bargaining and the rationale for the positions which the parties took. On November 14, 1986, the Board, by telegram, advised the parties of its decision that the application should be dismissed, indicating that its reasons therefor would follow. Those reasons are set out below. For ease of exposition we shall occasionally refer to the applicant as "the union", the respondent as "the employer", and the Ministry of Community and Social Services as "Comsoc". The facts are not substantially in dispute.

3. The respondent is a non-profit corporation which came into existence in 1979. It is operated under the direction of a volunteer Board of Directors, drawn from the surrounding community and composed of citizens interested in community service work. William Charron is an example. He has been a social work administrator in the Niagara region for fourteen years, was a founding board member of the respondent, and has been on its personnel committee for four years.

4. As its name suggests, the respondent's primary responsibility is to operate a home for the detention of juveniles, placed in its custody by the Courts under the provisions of the *Young Offenders Act*. These juveniles are kept in a residential setting and are either engaged in activities in the home, or go to school. The respondent is responsible for developing a program of observation and care which includes reporting requirements and specific goals and objectives likely to enhance the rehabilitation process.

5. The respondent's "clients" are drawn primarily from the Regional Municipality of Niagara, but may include other children if local facilities are not available. Apparently children can be moved from one institution to another as needs require. The respondent's home has the capacity to accommodate ten children, but the actual number varies from time to time depending upon the

disposition of the Courts and the number of "open custody cases" in the system at any particular time.

6. The respondent is one of a number of similar facilities in southwestern Ontario. Some of these homes are operated by community - based non-profit organizations such as the respondent. Others are operated for private profit. Still others (such as the Arrell Home in Hamilton or the Syl Apps Home in Oakville) are operated directly by Comsoc and staffed by civil servants.

7. The employees of the respondent and of the homes run for profit, have been considered to be bound by the *Labour Relations Act* - even though they perform an important public service with which Comsoc is intimately concerned, and which, in many respects parallels or supports services offered directly by the Crown. These employees have full collective bargaining rights, including the right to strike. In contrast, the employees in the homes operated directly by Comsoc are covered by the *Crown Employees Collective Bargaining Act*. They have no right to strike. Their terms and conditions of employment are determined by compulsory interest arbitration. The programs or degree of security may vary from home to home, but the evidence before us does not demonstrate any fundamental difference, for labour relations purposes, between employees in the private, community, or government-run facilities. Indeed, it might be argued that in a more open setting, the employees have greater responsibility because they have to deal directly with behavioral difficulties.

8. There is no doubt that the respondent is controlled and supervised by Comsoc which provides *all* of its funding. The respondent is responsible to, and monitored by a Comsoc Regional Manager, and must comply with detailed regulations under the *Child and Family Services Act* S.O. 1984, c.55. Although we were told that this Act does not touch directly on the employees' terms and conditions of employment, a perusal of its provisions indicates that the premises, programs, and services provided by the employer are all closely regulated. Comsoc has much more than the "power of the purse". Through regulations approved by the Lieutenant Governor in Council, Comsoc also has the power to impose legally binding standards of performance, security, reporting, and documentation. Any budget surplus of the respondent reverts to the Ministry. Any budget deficit would normally be deducted from the operating budget for the next fiscal year. The respondent's fiscal year is the same as that of Comsoc itself: April 1 - March 31. In many respects, the respondent resembles an agency of the Crown.

9. For fiscal 1985-86 Comsoc has approved and funded a budget for the respondent which envisages wage increases of no more than four per cent. A similar amount is allocated for fiscal 1986/87, and is anticipated for fiscal 1987-88. Wages make up a little more than seventy-five per cent of the respondent's total budget. The other budget items include: rent, fuel, program funds, food and general supplies. The union agrees that, although the budget is formulated on a line by line basis, no significant sums could be transferred from these items to the salary account, no significant economies are possible, and even a freeze or reduction in management salaries would not amount to very much. If the union's monetary objectives are to be achieved, Comsoc will have to come up with more money. That is the nub of the union's concern. In the union's submission, the collective bargaining impasse results entirely from Comsoc's unwillingness to fund the program at a level which would permit wages and benefits equivalent to or approaching those already being paid to the civil servants working in government-run juvenile detention homes, and providing equivalent services. Comsoc has found a way to deliver the necessary services much more cheaply, (while at the same time maintaining significant control), and without being subject to the strictures of the *Crown Employees Collective Bargaining Act* ("CECBA"). Under CECBA, the employees are entitled to an impartial adjudication of the merits of their dispute and an arbitrator is entitled to consider any factor which appears to be relevant. S/he is not bound by any predetermined wage

target or ceiling. The respondent's employees have no automatic access to arbitration, so that their wage claims, however valid, may be limited by Comsoc's mandatory guidelines.

10. Although Comsoc is not the nominal employer and is not nominally at the bargaining table, there is no doubt that it does play a pivotal - if indirect - role in the negotiations. As pay master, it sets the budgetary constraints within which the respondent must operate; and whether the particular number is three per cent, four per cent, or five per cent, it is Comsoc which, in reality, sets the wage parameters. When faced with union demands beyond that level, the respondent went to Comsoc to see whether the ceiling was firm. The union does not dispute the respondent's efforts in this regard. There is also no question that the respondent would be willing to pay more (and might even match the "public sector" rates paid at other homes) if Comsoc were prepared to underwrite the costs.

11. However, Comsoc's involvement also has another dimension. It is (or believes itself to be) ultimately responsible for the welfare of the juveniles assigned to the respondent's care. Accordingly, Comsoc has made a commitment to work with the respondent to develop a specific "strike plan" for the transfer of the respondent's charges to non-union or public sector facilities in the event of a work stoppage. In the union's submission, Comsoc is prepared to absorb any resulting costs (including the legal costs of negotiation and these proceedings) rather than bend its position on the respondent's budgetary allocation. Comsoc is portrayed not only as the real paymaster, but also as the potential "strike breaker", with unlimited resources to effectively sterilize the process of collective bargaining. Unlike an ordinary employer, the respondent faces no real "down side risk" even if the ultimate financial outlay exceeds what it would take to settle the dispute, because Comsoc will "pick up the tab". That is why the union asserts that collective bargaining has been conducted in a straight jacket: the nominal employer can only bargain within rigid and externally imposed limits but is effectively immunized from the pressure of a strike by the actions of the government funding agency.

12. We shall return to this theme later. First, it is necessary to briefly describe the course of collective bargaining. In so doing, we will not recite the details of the parties' positions on particular issues. We shall try to give an overview, occasionally illustrated with a few examples.

II

13. On February 1, 1985, the union was certified as the bargaining agent for a "full-time" and a "part-time" bargaining unit - each consisting of approximately eight employees. On April 10, 1985, the union served notice to bargain. On October 9, 1985, almost six months later, the parties began negotiations.

14. There is no explanation why the parties took so long to get bargaining underway, and no allegation that the respondent was delaying things or refusing to recognize the union's bargaining authority. There were five meetings prior to February 14, 1986, when the union requested the appointment of a conciliation officer. On March 3 and March 4, 1986, the parties met again, and on March 11, the Minister issued a "no Board" report. On or about March 27, 1986, the union was in a position to call a strike. There was a strike vote, but no strike was called. On April 3, 1986, the parties met with a mediator. On at least three occasions thereafter *the employer* initiated further mediation sessions in an effort to resolve the dispute. The employer was anxious to conclude a collective agreement.

15. This application was filed on October 20, 1986. In the mediation sessions of November 6 and November 10, 1986, a number of outstanding issues were resolved. The union concedes that

a number of other issues could probably have been resolved before the hearing but, as its negotiator put it, “we ran out of time”.

16. As of the date of the hearing the parties were still at odds on quite a number of wage and non-wage issues. In respect of the latter, we are constrained to conclude that the disagreement results, at least in part, from the union’s failure to fully explore the employer’s proposals, a failure to realistically weigh the likelihood of achieving “Cadillac language” in a first collective agreement, and the assumption that the employer, without assured means, would routinely agree to positions that have been established for government operated homes. The employees directly employed by Comsoc are part of a bargaining unit of some sixty thousand civil servants whose employment conditions are established by an arbitration process undertaken in light of the special characteristics of this large civil service bargaining unit. While equity or fairness might suggest that the respondent’s employees should be dealt with and paid in the same manner as their civil service counterparts, that is not necessarily a realistic collective bargaining stance. The fact is, that even if the respondent’s employees are performing similar tasks, they have not been paid at the same level as the civil servants working in Comsoc’s juvenile detention centres, nor should they have reasonably expected to automatically receive equivalent remuneration.

III

17. It was obvious to us that, at the time of the hearing, there were still a number of issues in dispute separating the parties and complicating the bargaining process which could not, by any definition, be considered *critical* or *strike issues*. For example, the parties were apart on the number of days a job vacancy should be posted; on whether a medical certificate should be provided after three *days* or three *consecutive days* of absence; on whether *relevant tests* could be used for *determining* the qualifications of applicants for vacant positions (the union’s proposal) or for the purpose of *assisting the employer in determining* an employee’s qualifications (the employer proposal). Maternity/adoption leave remained in dispute because, having acknowledged both, the employer sought to retain some discretion about granting *extensions*. The employer had always acknowledged the *Employment Standards Act* minimums, and had gone beyond those in its proposal. Because the work force was predominantly male, and no one had ever actually taken maternity leave, the employer saw no reason to agree to a more generous entitlement in a first agreement. The union explained that its proposed clause was a standard OPSEU provision dictated by its “women’s caucus” from which it could not retreat. In a number of instances the union sought specific language to avoid any possibility of arbitral deference to management rights - a position which is entirely understandable, and indicates an appreciation of current arbitral trends but would have involved contract language quite different from what one ordinarily finds in most collective agreements. In several instances - including reporting pay and extra car insurance - we have concluded that the union may not have fully considered the consequences of its own position, or the precise economic impact of its proposals on the employer. In the case of extra car insurance it appears to us that what the union regards as a nominal item may, in fact, involve a significant cost per employee.

18. We need not multiply the examples. On these benefit or non-wage items (which nevertheless form an important part of the employment and collective bargaining relationship), we find that there was considerable room for further discussion, clarification and compromise. Much was accomplished between the filing of this application and the hearing date, and the union frankly acknowledged that more might have been accomplished if there had been more time. As late as the hearing itself, the representatives of the union or the employer occasionally interjected: “look, that’s not really a problem, we think we can work that one out, there may be some misunderstanding here and let’s move on to the real issues.” There was obviously room for further negotiations,

there were in fact further negotiations, and because of this hearing, the Board was thrust into the middle of it.

19. Money was a problem and remained so. The union was determined to close or narrow the gap between what is currently being paid to civil servants in government run homes and the employees in this government funded and controlled facility. The employer, on the other hand, was faced with the reality of its budget limit and, having approached Comsoc (without success) to raise the ceiling, it felt compelled to formulate its position in terms of the funds available. But this does not mean that the employer's position was inflexible, even though it was working within a specific mandate. The departure of certain senior employees at the "high end" of the proposed salary grid made funds available which the employer was quite willing to distribute elsewhere - particularly to part-time workers who it agreed might be underpaid. (The parties were in dispute about whether part-timers performed basically the same job as full-timers, but as of the date of the hearing had not fully explored this difference. The union conceded that there may have been some misunderstandings and there was reason for further clarification.) Similarly, the employer proposed that limiting retroactive wage payments to persons no longer working for the respondent would permit a more generous payment to those still in its employ, and by limiting the benefit entitlements of part-time workers (something that is not at all unusual in industry), there would be more for full-time workers. The respondent's final wage proposal involves a wage increase in the neighbourhood of four per cent for full-time workers and (because of the re-distribution mentioned above) a wage increase in the neighbourhood of thirty per cent for part-time workers. These increases are not out of line with what is currently being negotiated, nor is the treatment of part-time workers proposed by the employer much different from that which has prevailed, for years, in its own organization and in many industrial contexts. It may be that part-time workers should be treated on the basis of parity and equivalence, but that has not been and is not now the case; nor (unless the respondent were treated as a Crown Agency) - is it obvious that the result of sincere bargaining on the respondent's part should inevitably result in a salary or benefit package approaching or modelled on that currently prevailing for the huge civil service bargaining unit.

20. In this case, we cannot conclude that the process of collective bargaining has been *unsuccessful* because of one or more of the enumerated parts of section 40a(2). Indeed, it is too early to say that it has been *unsuccessful* at all. The employer has recognized the union, and has made considerable, and, in our view, reasonable efforts to conclude a collective agreement. The employer has not engaged in unfair labour practices, nor taken a rigid stance at the bargaining table designed to show employees that they cannot benefit from collective bargaining. The employer has tried, insofar as its budget permits, to accommodate the union's concerns. It has not resisted a degree of joint decision making or "codetermination" which is the inevitable concomitant of the collective bargaining process. It has not, by and large, opposed most of the standard language which one usually finds in collective agreements. It has not made elaborate claims for unfettered management rights which, if accepted, would make the agreement meaningless or significantly restrict an impartial arbitral review of its decisions. Where it has pressed hard to retain its prerogatives (on scheduling, for example) there were good business reasons for doing so, and it was still prepared to consult the employees' representatives. Its bargaining stance has not been punctuated by rigid assertions of "principle" or "prerogative", unconnected with its actual market context or business needs. Indeed, it appears to us that the respondent is prepared to agree to a fairly standard first contract.

21. The respondent maintains (and we accept) that it has not resisted the process of collective bargaining or its consequences, or engaged in delaying tactics or equivocation designed to undermine the solidarity of the bargaining unit. At this stage it has not even asserted its superior bargaining power as justification for its bargaining stance. In fact, the real balance of bargaining

power remains unclear. Despite the union's assertions of impotence, it is not evident that a strike would have no impact. Even if Comsoc were to intervene, it is not obvious that children could be readily uprooted and transferred to different facilities without generating some dislocation and additional costs - costs which Comsoc might wish to avoid by reconsidering the respondent's budget allocation. And if Comsoc was prepared to play an active role as strike-breaker, and absorb costs which in other contexts might prompt a settlement or might even exceed the costs of a settlement, that might very well highlight the union's argument under section 40a(2)(d). Moreover, section 40a neither requires, nor rules out, resort to a strike or lockout - the traditional levers in a collective bargaining process which recognizes the realities of economic power and is designed to elicit compromise, concessions and accommodation. A work stoppage may well be a relevant factor, just as the union's inability to mobilize effective pressure may be relevant - especially where it results from the employer's previous misconduct or the employer's intransigent and unreasonable bargaining stance. If there has been a collective bargaining break-down, the Board must carefully scrutinize the conduct and attitudes of both bargaining parties, to discern whether the impasse, while not amounting to bad faith bargaining, fits within section 40a(2)(a)-(c), or involves circumstances which would warrant an exercise of the Board's discretion under section 40a (2)(d). Indeed on its face, section 40a (2)(d) could be construed as a rather extraordinary invitation from the Legislature to "break the log-jam" even when the respondent's conduct does not amount to bad faith bargaining, or otherwise does not fit squarely into items (a)-(c).

22. However, we are simply not at that point yet, and therefore decline to speculate further. As things now stand, we cannot say that collective bargaining has been "unsuccessful" because the parties are not yet at impasse and, in our view, could profit from further discussions.

23. For the foregoing reasons, this application is dismissed.

1104-83-U Gerald Lecuyer, Cash Podlewski and John Polhill, Complainants, v. Canadian Paperworkers Union, Local 132 and Canadian Paperworkers Union, Respondents, v. Abitibi-Price Inc., Intervener

Arbitration - Duty of Fair Representation - Practice and Procedure - Remedies - Unfair Labour Practice - Direction to arbitration inappropriate remedy for union's breach of fair representation duty when dispute between union and complainant - Board hearing merits of grievance - Rules applicable to court proceedings used to calculate interest on lost wages - Costs denied

BEFORE: *Owen V. Gray*. Vice-Chairman, and Board Members *J. A. Ronson* and *L. C. Collins*.

APPEARANCES: *F. J. W. Bickford, J. D. Polhill, C. W. Podlewski* and *Gerald A. Lecuyer* for the complainants; *W. Dubinsky, J. R. McInness, Martin Brindley* and *Dick Facca* for the respondents; *D. W. Brady, A. Shields, R. Dixon* and *O. Halushak* for the intervener.

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN; December 29, 1986

I

1. The matters dealt with in this decision arise out of the majority decision in this matter dated July 23, 1985, now reported under the name *Gerald Lecuyer*, [1985] OLRB Rep. July 1099,

and hereafter referred to as “the initial decision.” The nature of the complaint in this matter was described in paragraph 1 of the initial decision:

The three complainants are skilled tradesmen employed by Abitibi-Price Inc. (“Abitibi”) in the mechanical department of its Mission Mill (“the Mill”) at Thunder Bay. At all times material to this proceeding, the terms and conditions of their employment and that of other Mill employees were governed by a collective agreement between Abitibi and “the Canadian Paperworkers Union, CLC and its [sic] Local 132” (referred to here, as in the collective agreement, as “the Union”) with effect from May 1, 1982 to April 30, 1984. Beginning in July, 1982, there were several occasions on which employees were selected for short-term layoff from their regular jobs on the basis of their length of service at the Mill (“mill seniority”). The complainants and others in the mechanical department felt such layoffs violated the terms of the collective agreement, which in their view required that selection of employees for layoff from their regular jobs be based on length of service in the department concerned (“departmental seniority”). The complainants attempted to grieve the effects and potential effects on them of the company’s reliance on mill seniority in effecting layoffs in July, 1982 and thereafter. The union, however, refused to accept or present some of their grievances; the others of those grievances were not taken beyond the first step in the grievance procedure, where they were denied by the employer. The complainants say that the Union’s treatment of them and their grievances violated sections 68 and 70 of the *Labour Relations Act*...

2. The initial decision found that through certain acts and omissions of Ron Balina, the then President of Local 132, the respondents had acted in a manner which was both arbitrary and in bad faith in representing the complainants, and in so doing had violated section 68 of the Act. In refusing to process the complainants’ grievances, Balina had told the Local’s membership that a similar grievance (“the Landversitch grievance”) had been denied by the company at Step 2 on the basis that there was no violation of the collective agreement. In fact, that had not been the company’s response. Its response had been that, in the past, departmental seniority had indeed been the basis on which employees had been selected for layoff and mill seniority had only provided an employee with access to “bottom jobs” in other departments in the mill once that employee was laid off from his own department on the basis of departmental seniority. In its step 2 response to the Landversitch grievance, the company had gone on to say:

... however, since Mr. Balina indicated agreement with the Company’s procedure and since he has taken the position that it should continue in the future, the Company will not amend this practice unless Mr. Balina, on behalf of Local 132, indicates a desire to handle future situations on a departmental seniority basis.

Balina had withheld this response from the membership. He had also withheld from the membership a letter written to him by the mill manager reiterating the company’s position that the use of mill seniority in determining order of layoff had been and would be solely the result of Balina’s having asked the company to take that approach, and that the company would revert to the use of departmental seniority if the union so requested. In short, Balina had told the complainants and the membership that the company was resisting the complainants’ claim when, in fact, it was he whose resistance was responsible for the failure of their grievances. Within the local union, it was well understood that its officers could not change the collective agreement except through collective bargaining which, by union custom, would require membership approval of any proposed amendment before the union could present it to the employer. Any resort the complainants might otherwise have been able to make to this rule or to internal union procedures was undermined by Balina’s misrepresentations to the membership about the company’s interpretation of the collective agreement in its answer to the Landversitch grievance. While other facts contributed to the finding that Balina’s behaviour resulted in violation by the respondents of section 68, the facts just recited are particularly important to an understanding of the approach we have taken to formulation of a remedy in this matter.

II

3. The major remedy sought by the complainants was a direction that the respondents take the complainants' grievances to arbitration. The initial decision expressed concern about the propriety of that remedy in the particular circumstances of this case. After reviewing the Board's jurisprudence with respect to referral to arbitration, the initial decision made these observations:

79. This case differs from those in which the Board has directed that the trade union and employer process the complainants' grievance to arbitration. The fundamental difference is that the underlying dispute is not between complainants and their employer; the real dispute is internal to the union. If the union had decided to advocate the complainant's interpretation of the collective agreement, the evidence now before us suggests very strongly that Abitibi would have accepted and acted on that interpretation. As a result, when assessing the damages to the complainants which result from the union's breach of the Act, the likely outcome of a grievance supported by the union is a much less critical contingency than the question whether the union would have decided to support the grievance if it had dealt with that question in a manner which was not arbitrary, discriminatory or in bad faith.

80. With the possible exception of the layoffs in July, 1982, the layoffs which the complainants wish to challenge at arbitration were carried out in accordance with a procedure the employer adopted or continued at the union's request. A challenge in the union's name to the employer's use of that procedure after that request was made and while it remained outstanding would surely be answered with the defence that the union is estopped from challenging the procedure it approved in the October meeting on the Landversitch grievance. It would clearly be unfair for us to fashion a remedy which exposes the employer to liability to the complainants for the adverse consequences to them of a layoff procedure requested by their union. If we were to direct arbitration and require that the employer not raise the estoppel defence, then we would also have to direct that the union bear liability for any damages awarded in arbitration with respect to claims against which the estoppel defence would have been successful. This would leave Abitibi with no reason to resist the position which our order would permit the complainants to assert in the union's name, unless we were also to take up Abitibi's rhetorical request that we tell it what position to take if we direct a referral to arbitration. This all seems a highly artificial and unsatisfactory way to assess damages for which only the union would ultimately be responsible.

81. The dynamics of an arbitration with respect to the July, 1982 layoffs might be different. We have not heard Abitibi's version of the discussion about mill seniority at the union-management meeting of June 23, 1982, and do not know whether a challenge to the July layoffs might be met with an estoppel defence arising from that discussion. Even assuming that it would not, Abitibi's second step answer to the Landversitch grievance does not leave much room for dispute in an arbitration in which the position taken in the name of the union is the same as the position set out in the second paragraph of Abitibi's letter.

82. In short, with the possible exception of losses resulting from the July, 1982, layoffs, it is the union, and not the employer, that will be liable for any damages to which any of the complainants can show they are entitled for layoff out of seniority. Whatever value an arbitration between the employer and the complainants acting in the name of the union might have in assessing whether Abitibi should pay damages to Podlewski in respect of the July, 1982 layoffs, that procedure could not be expected to fairly assess the contingencies which affect an assessment of the union's liability to the complainants for damages in respect of any of the other layoffs. For all these reasons, we doubt whether any direction to proceed to arbitration should form part of the remedy in the circumstances of this case, and we are certain it should not be the means by which the union's liability for damages is ascertained.

83. Accepting at face value the union's claim that its object in deciding whether to support the complainants' position was to act in a manner consistent with the language of the collective agreement and the parties' past practice, one way to determine the appropriate remedy for the union's breach might involve a determination by this Board of the meaning of the collective agreement. This could not and would not be done without first hearing any evidence or argument which any of the parties wish to add to what we have already heard. If we were to find in

favour of the complainants' interpretation, we would then go on to assess the damages payable by the union with respect to layoffs after July, 1982, and to determine whether either the union or the employer is responsible for any loss in respect of the July, 1982 layoffs.

4. As the parties' arguments had not addressed the possible alternatives to a referral to arbitration, the initial decision went on to request their submissions on that matter in writing. The written submissions on behalf of the complainant employees and intervener employer supported the approach described in paragraph 83 of the initial decision. The respondents, however, opposed that procedure on several grounds. The first was that it would be unfair for this panel to hear evidence with respect to the meaning of the collective agreement because:

The evidence that will be tendered, might very well be tendered by some of the same witnesses who have already adduced evidence before this tribunal.

The tribunal has expressed some comments either directly or indirectly as to the motives and relationships that the tribunal has interpreted as affecting the relationships between the Parties. By implication, this may be interpreted by the Parties as reflecting upon credibility. Having done so, it is our submission that it would be unfair to the Parties to have this Board now determine the issue on the merits.

This submission is without merit. The Board quite regularly bifurcates its hearings with respect to the issues in proceedings before it. The most frequent bifurcation involves hearing only evidence with respect to liability to pay compensation for any losses suffered by a complainant, while deferring the hearing of evidence with respect to the quantum of the complainants' loss and retaining jurisdiction to do so later should that be necessary. When the Board does have to hear evidence with respect to quantum, the witnesses involved in giving that evidence are often the same witnesses who have given evidence with respect to the liability issue, and the Board's earlier observations with respect to their credibility are no less relevant when assessing the credibility of their evidence with respect to quantum than they would have been had evidence with respect to both liability and quantum been heard together in a single hearing. As it could hardly be suggested that the Board would be acting unfairly if a single panel heard all of the evidence with respect to all of the issues raised in proceedings before it in a single hearing, I am unable to see how a single panel's conducting the second of two hearings on suitably bifurcated issues can be unfair.

5. Counsel for the respondents also observed, as did the initial decision, that the Board's decision in *Massey Ferguson Industries Limited*, [1977] OLRB Rep. April 216, stated that referral to arbitration was the approach the Board intended to take thereafter, and that the Board had taken that approach in most subsequent cases. He then made this submission:

The events which gave rise to this complaint occurred in 1982 and thereafter. In fact, the circumstances in the Union have changed considerably in the past three years. As the events would disclose, Mr. Ron Balina is no longer the President of the Union. Making note of the Board's comments concerning the "ill will" that Balina had towards Podlewski, one could conclude that that "ill will" has now been removed. In view of the Board's policy and the change in circumstances that now exist, we would urge upon the Board to make a decision to direct that the Parties proceed to Arbitration before a tribunal constituted pursuant to the provisions of the Collective Agreement.

Counsel's submissions did not address the distinctions which the initial decision drew between the peculiar circumstances of this case and the circumstances which existed in those cases in which the Board did grant a direction that the complainants' grievance be taken to arbitration. What counsel seems particularly to have overlooked in his submissions is that a trade union directed to take a complainant's grievance to arbitration is ordinarily obliged to support the complainant's position at arbitration. Indeed, the usual order directs that the trade union retain counsel satisfactory to the grievor to present the grievor's case at arbitration. The role at arbitration of counsel so retained

was described in paragraph 8 of the Board's decision in *Central Stampings Limited*, [1984] OLRB Rep. Oct. 1383:

... The provision in the Board's original decision for the selection of counsel on a joint basis clearly contemplated that counsel would pursue without distraction the interests of the *complainant* with respect to the handling of his grievance. This became necessary because the Board's apportionment of liability created the unusual situation of the trade union having an interest diametrically opposite to the member on whose behalf it had been directed to advance the grievance. To eliminate even the *perception* that the trade union might, in light of this conflict, not be doing its utmost for the grievor at arbitration, the grievor was given the right to select an advocate in whom he had confidence. Because the trade union continued to be responsible for the legal fees incurred in presenting the arbitration, however (as it would have been had it not "arbitrarily" withdrawn the grievance in the first place), the Board gave the trade union the right to approve the complainant's selection of counsel as well. Counsel is not, however, meant to be placed thereby in a position where he serves two masters - that would resurrect precisely the kind of conflict situation that the choice-of-counsel provision was meant to eliminate. Rather, the counsel so selected is expected to all at all times in the interest of the grieving employee, ...

In other words, the usual order gives a successful complainant the right to assert his or her own position on the subject matter of the grievance at arbitration in the name of the union at the union's expense. As counsel retained to present that position would be acting in the name of the union at arbitration, it is difficult to see how any one else purporting to speak for the union could have standing in the arbitration proceedings to take any position inconsistent with that asserted by that counsel. As was observed in the initial decision, this is not an unreasonable arrangement for the resolution of the merits of the underlying representational question in respect of which the union has been found to have acted contrary to section 68, if that underlying question is essentially a dispute between the employer and the complainant/grievor. Here, however, the underlying representational question was a dispute over the meaning of the collective agreement between the complainants and the union official who was in *de facto* control of all the mechanisms by which that dispute might have been resolved. The employer appeared to favour the complainants' interpretation, but had been prepared to abide by the union official's request that his interpretation be followed because he had ostensible authority to speak for the union. The observation of the initial decision was that a referral to arbitration in which the employer's interpretation and that of the complainants might be the only positions which could be advanced would not, from the *union's* perspective, be a fair way to determine the underlying question and assess damages which would ultimately be borne either in whole or in large part by the union. The submissions of counsel for the union did not alleviate my own concern in that regard.

6. Finally, counsel for the union made the following submissions:

If in fact the Board is considering a remedy that is entirely an alternative to any referral to arbitration, then we would direct the Board to recall the real issue that existed in the grievances that were in fact filed. The issue was, and appears to remain, as to whether mill seniority or departmental seniority, is paramount when a layoff occurs.

Is this an issue that should be settled by a Board of Arbitration? Or by a Labour Relations Board? In fact, is this not an issue that should be determined by the Parties through negotiations? If it is to be determined through negotiations, should not the membership of the whole Local determine the position they desire to have their Union take?

The alternative to arbitration of a number of grievances would appear to be a Direction to the Parties to direct their minds to the wording in the Collective Agreement. We suggest that the Board consider directing the Union to hold a vote by secret ballot to determine what position the Union should take on the matter of mill seniority versus department seniority, and to be

guided by the results of that referendum in determining the course that it will follow in the next round of negotiations.

I agree with counsel that the issue at the time of the violations was “whether mill seniority or departmental seniority *is* paramount when a layoff occurs”, having regard to the provisions of the collective agreement and the past practice in the applying that collective agreement at the Mission Mill as of the time the Act was breached. That is the way the complainants defined the issue at that time, and it is also the way the then president of the local defined the issue. Significantly, the issue was never defined as “whether mill seniority or departmental seniority *ought to be* paramount when a layoff occurs”, which is, in essence, the question counsel suggests be put to a vote of the local union’s membership as a remedy for the respondents’ breach of the Act. Both sides in the debate over the meaning of the collective agreement and the nature and consequences of past practice in the mill at all material times insisted that the existing rule, whatever it was, could not be altered except through collective bargaining, and that the union could not seek a different rule in collective bargaining without the express authority of a resolution of the membership. Each side maintained that the other’s position could not be advanced in the union’s name without such a resolution of the membership, and each side took comfort in the fact that the other had not sought such a resolution. Each side recognized the disadvantage it would have if it was seen as advocating a change in the accrued rights and privileges attaching to each form of seniority. As a practical matter, each side chose to focus on what the rule then was and avoid debate over what it ought to be. In effect, the debate was over the proper outcome of an adjudication of the meaning of the existing collective agreement, not over the more complex question of the balance which ought to be struck between competing interests in determining what provisions ought to be sought in collective bargaining.

7. As a result, the remedial problem was similar to that encountered in cases in which the respondent trade union maintains that a complainant’s grievance ought not to have been taken to arbitration because the grievance lacked merit. To paraphrase what was said at paragraph 78 of the initial decision, where the likely result of an assessment of the complainant’s rights under the collective agreement is the critical contingency in an assessment of the loss the complainant had suffered as a result of the union’s having made its decision in an improper manner, there is an obvious logic to assessing that contingency by actually adjudicating the complainant’s rights under the collective agreement. A vote of the membership does not seem an appropriate forum for such an adjudication, having regard to the conflict of interest created by the fact that the union’s exposure to liability would hinge on its membership’s decision. The fact that Mr. Balina is no longer the President of the local makes it no less difficult to imagine that a decision by the membership about the meaning of the collective agreement would not be influenced by the fact that acceptance of the complainants’ interpretation might result in depletion of union funds to pay damages to the complainants, whereas a contrary decision would not.

8. In the result, having considered the submissions of the parties, each of the members of this panel concluded that the approach suggested in paragraph 83 of the initial decision should be followed in this case, giving the complainants, the trade union and the employer all the opportunity to participate in an adjudication of the meaning of the collective agreement for the limited purpose of assessing the remedy to which the complainants were entitled with respect to the trade union’s of section 68 of the *Labour Relations Act*. The parties were so advised by decision dated August 29, 1985, which directed that the matter be relisted for hearing at the earliest practicable date. Having regard to this panel’s availability and the desires of the parties for accommodation of the availability of their counsel, the earliest practicable dates were April 3 and 4, 1986. On those dates the panel heard such evidence and argument as the parties wished to add to what we had

already heard with respect to the interpretation of the collective agreement and any other matter relevant to outstanding remedial issues.

9. Before turning to the results of the April hearings, I think it important to note that my decision to consider the meaning of the collective agreement in order to devise an appropriate remedy in this case does not signal abandonment of the general approach to section 68 complaints contemplated by the decision in *Massey Ferguson Industries Limited*, *supra*. In that decision, the Board settled two policies with respect to its adjudication of complaints which allege that the respondent trade union breached section 68 of the Act by or in the course of deciding not to take the complainant's grievance to arbitration. The first had to do with the way the Board would exercise its remedial authority if such an allegation were established and it appeared to the Board that the appropriate remedy should include the relief, if any, which would have been obtained for the complainant if the union had taken the grievance to arbitration. The Board recognized that it could give the complainant that remedy by adjudicating the merits of the grievance itself and using its authority under section 89 to grant any relief (including reinstatement and compensation) which it concluded would have been granted by an arbitrator or arbitration board. Alternatively, it could direct that the grievance be referred to arbitration, with directions that objection to arbitrability not be raised by the employer on the basis of the union's earlier delay, abandonment or withdrawal of the grievance and, in appropriate circumstances, that the union retain independent counsel to represent the grievor's interests in the union's name at arbitration. In response to procedural uncertainties created by the possibility that the Board would take the first mentioned approach at the conclusion of a hearing, the Board in *Massey Ferguson* announced it would abandon that possibility, so that trade union and employer parties to complaints of this sort could be assured that they need not deal with the merits of the grievance in the hearing of the complaint except to the extent that the merits of the grievance are relevant to the question whether the union has breached section 68. That assurance was the second of the two policies established in the *Massey Ferguson* decision: that evidence going to the merits of the grievance would be considered to determine whether there has been a breach of section 68 but not to determine what remedy would actually have been obtained had the grievance been taken to arbitration.

10. The decision in *Massey Ferguson* suggested that there were no circumstances in which the Board would itself inquire into the merits of a grievance for the purpose of devising a remedy for the union's breach of section 68. The circumstances of this case led me to conclude that, for that purpose, we should inquire into the merits of the grievance or, more precisely, the correctness of the complainant's interpretation of the collective agreement (as opposed to the likelihood of success at arbitration, which involved the additional question whether the employer would advocate any contrary interpretation). The unique features of this case were not present in the *Massey Ferguson* case, nor were they present in any of the cases to which the Board referred in that decision. It may be that future cases will disclose other circumstances in which the referral to arbitration remedy discussed in *Massey Ferguson* would be inappropriate. That is not to say that there has been anything inappropriate about the use of that remedy in past cases, and my decision not to make use of it in the circumstances of this case is not a rejection of its utility in other circumstances.

11. It is apparent that the Board cannot now say that it will never consider the actual merits of the grievance in fashioning a remedy for a breach of section 68 which somehow involves a union's failure to take the grievance to arbitration. That does not mean, however, that union and employer parties to such complaints must now lead evidence which is relevant only to the merits of the grievance, and not to the existence of a breach of section 68, before a breach has been demonstrated. For reasons outlined in *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449, the Board's longstanding practice with respect to claims for compensation has been to first determine whether

there is liability to pay compensation, leaving the quantum of compensation to be determined only after there has been a finding of liability. For many of the same reasons, it should continue to be the Board's ordinary practice that any question of the appropriate remedial response to the grievance itself will be addressed, whether at arbitration or (where referral to arbitration is inappropriate) by the Board, only if and after there has been a finding that section 68 has been breached. The reasons for bifurcating the issues in that manner remain as cogent, both generally and in circumstances like those presented by the case before us, as they were at the time the *Massey Ferguson* decision was written.

III

12. The relevant provisions of the then current collective agreement, and the complainants' interpretation of those provisions, were set out in paragraphs 7 to 10 of the initial decision. For convenience, those paragraphs are reproduced here:

7. The millwrights and pipefitters in the mechanical department repair and maintain, and occasionally construct additions to, the Mill's equipment and mechanical systems. In the fall of 1982 there were approximately eight journeymen pipefitters and twenty journeymen millwrights in the mechanical department. Some, like the grievors, had been journeymen tradesmen when they began work at the Mill. Others became journeymen after becoming employed at the Mill, either by serving a four-year apprenticeship program under Abitibi's Trades Apprentice Plan, or by establishing proficiency in the trade to the satisfaction of the company's evaluation committee under the Tradesman Promotion Plan after serving a minimum of seven years as a helper in that trade and completing a correspondence course equivalent to that taken by apprentices. Both of these plans have formed part of the collective agreements between Abitibi and the Union for many years. Article 34.03 of the current collective agreement provides:

34.03 When a man transfers from some other job to the status of an apprentice in one of the mechanical trades, he shall maintain his seniority in the job from which he is transferred for a period of six (6) months. Following such probationary period, his seniority shall develop exclusively within the mechanical group to which he transferred. If, when the period of apprenticeship (four (4) years) is served there is a vacancy for a journeyman in the trade for which the apprentice is qualified, he will be retained and will be granted two (2) years' seniority as a journeyman and will become eligible for promotion in accordance with the Tradesmen Promotion Plan.

The language of Article 34.03 appears again in paragraph 11 of the Trades Apprentice Plan, which is Appendix "I" to the collective agreement.

8. Article 7 of the collective agreement reads:

7. PROMOTIONS AND LAY-OFFS

7.01 When vacancies occur in a department then the Company shall post on bulletin boards throughout the mill a notice concerning the bottom job in the department affected. Such notice shall indicate the qualifications essential to promotion within that department. Such posting shall be for a period of ten (10) working days and the Company shall have the right to make temporary appointment without penalty. *In all cases of promotion the Company will give consideration to seniority, ability and qualifications. When the last two factors are relatively equal, seniority will govern.*

7.02 In cases of promotions, where the man to be promoted is not the senior man in the department concerned, the Company will present the alternative name to the Union, who will have the opportunity to discuss with the Company the qualifications of the senior man. The Company shall take such presentation into consideration in making its decision which decision may be subject to the grievance procedure outlined in Article 30 of this Agreement.

7.03 The Company will train employees to minimize the hiring of skilled men from outside the mill.

7.04 When laying off help Union men shall be retained in preference to those not members, among equally efficient employees, the older in point of service being given preference of employment (the same principles to govern as in the case of promotions).

7.05 In cases of lay-offs, plant wide seniority with due regard to jurisdiction of each of the signatory unions shall apply. In making transfers under this rule it is understood and agreed that in moving between departments, the senior man must have the necessary qualifications to enter the department and shall have access only to the bottom job in the line of progression in the department to which he is being transferred. If the number of senior employees involved in a permanent lay-off exceeds the number of junior employees holding bottom jobs in the lines of progression, the Company, if requested by the Union, will locate other job openings in jobs held by junior employees above the bottom jobs so as to assure continued employment for senior employees. Training will be given if necessary to the senior employees.

7.06 When employees are laid off they shall be recalled in reverse order of their lay-off.

Substantially similar provisions have formed part of Abitibi's collective agreements with the Union and its predecessor, Local 132 of the International Brotherhood of Pulp, Sulfit and Paper Mill Workers, for nearly thirty years. Some language has remained unchanged despite its becoming outdated. The reference in Article 7.05 to "each of the signatory unions", for example, make less sense now than it did in the 1950's and 1960's, when agreements between Abitibi and this Union's predecessor were also executed by four other (craft) unions. It is common ground that the past practice of the parties to it is an important consideration in the interpretation of this collective agreement.

9. The layoffs which trouble the complainants resulted from production shut-downs of varying durations. Prior to 1982, production shut-downs had generally not resulted in layoffs of journeymen in the mechanical department, as maintenance work ordinarily continued unabated during a production shut-down. The production shut-downs in and after July 1982, were different; they were more frequent, maintenance work was also reduced and journeymen tradesmen were laid off. When Abitibi followed mill seniority rather than departmental seniority in selecting journeymen for layoff, some tradesmen found themselves without work while men they had originally trained as apprentices or helpers remained at work.

10. Having regard to their understanding of past practice and to the language of Article 7, Article 34.03 and paragraph 11 of the Trades Apprentice Plan, the complainants believe the collective agreement provides that promotion to and layoff from any particular job are both governed by departmental seniority. Article 7.02 governs promotions, and the complainants say that the words "senior man in the department concerned" in that Article refer to the man with the most departmental seniority. The complainants emphasize the words in brackets at the end of Article 7.04, which deals with layoffs. They say those words mean that the seniority which governs the initial selection for layoff is the same seniority which governs promotion: departmental seniority. As a result, they say that selection of persons for layoff from their own departments is to be made on the basis of departmental seniority. They read Article 7.05 as giving effect to mill seniority only in the exercise of bumping rights - the right of an employee targeted for layoff from a job in one department to transfer into a job for which he is qualified in another department, a right the transferring employee can exercise only if he is senior to the employee performing the target job. Thus, in the complainants' view, if a layoff requires a reduction in the number of journeymen millwrights, it would be the millwrights with the least departmental seniority who would lose millwrights' work during the layoff period. Those redundant millwrights could then exercise their mill seniority to bump into any jobs remaining in other departments for which they are qualified.

13. During hearings with respect to liability, complainant John Polhill gave evidence of

events in 1969 which led him to believe that seniority as a journeyman in the mechanical department would prevail over mill seniority in the selection of journeymen to be laid off from the mechanical department. His evidence was recited at paragraph 11 of the initial decision:

11. John Polhill says his belief in this interpretation is reinforced by certain events which occurred in 1969. At that time Abitibi planned to lay off a journeymen pipefitter. The choice was between Polhill and Victor Wazinski, who had three weeks' more mill seniority than Polhill. Unlike Polhill, who had been a journeyman when he began working at the mill, Wazinski had begun work at the mill as a second year apprentice and did not qualify as a journeyman until three years after he was hired. At the time of the proposed 1969 layoff, Polhill was told that he would be retained in preference to Wazinski. Polhill recalls that this advice came in the form of a letter from a Mr. Neeley, a company official, who quoted the language of what is now Article 34.03 and explained that Wazinski's departmental seniority was less than that of Polhill because at the end of his first three years of employment he had been credited with only two years' seniority pursuant to that Article. Wazinski received notice of layoff. As it happens, that layoff was cancelled before it occurred. This was the only example any of the witnesses offered of a layoff of journeymen effected or announced prior to July, 1982, in which the choice between mill or departmental seniority as the basis for selection would have affected the identity of the person or persons selected for layoff.

As the initial decision also reflects, the complainants testified that these events had been referred to by Mr. Wazinski and Mr. Nieckarz (who had been President of the Local in 1969) during at least one membership meeting at which the complainants attempted to bring up their grievances (see paragraph 19 of the initial decision). The respondents called Nieckarz as a witness in the April hearings. He testified that in 1969 journeymen in the mechanical department were classified as "A", "B" or "C", that Polhill had been an "A" and Wazinski had been a "C" at the time of the incident referred to by Polhill in his testimony, and that this might explain why Wazinski would have been selected for layoff before Polhill. Cross-examination of Nieckarz established that these alphabetical classifications had to do with the nature of the work which the journeyman was qualified and entitled to perform, and that Nieckarz had no idea whether the "A" classification was a requirement for the work which would have been done after the proposed layoff of 1969. Furthermore, he conceded that this classification distinction had not been in his mind when he spoke out at the membership meeting in 1982. It was apparent from his answers on cross-examination that his more recent focus on this distinction resulted from a concern which he had since formed about the implications which the collective agreement interpretation advanced by the complainants would have with respect to layoffs in other departments of the mill. I need not assess the effect this concern may have had on his evidence before us with respect to the events of 1969, since that evidence is not inconsistent with the evidence of Polhill that the reason given to him by the company official for its layoff decision had to do with the application of what is now Article 34.03 and not any difference between his classification and that of Wazinski. Although the 1969 proposed layoff is the only evidence of past practice which focuses particularly on the mechanical department, other evidence with respect to past practice is consistent in pointing to departmental seniority as the basis on which workers have been selected for layoff out of their regular job and department.

14. The initial decision recorded the evidence of the then president of Local 132 with respect to past practice in the application of departmental and mill seniority in layoffs:

37. Balina acknowledged it had always been his view that mill seniority governed in the case of layoffs. He said this had been the policy of the Canadian Paperworkers Union for fifty years. It was not clear how he would know that, or where this union policy is to be found. Balina claimed that past practice favoured his interpretation of the collective agreement. In that connection, as we have noted, he had not made any investigation to determine what practice had been followed in the 1969 layoffs referred to in Mr. Polhill's evidence and, we find, by Mr. Wazinski at membership meetings. When the hearing of this complaint adjourned in February, 1984, we invited Mr. Balina to offer some examples of the past practice to which he had referred in evidence.

When the hearings resumed four months later, Mr. Balina offered several examples of layoffs in which employees had remained at work as a result of the exercise of mill seniority. However, as he acknowledged in cross-examination, every one of the examples he offered involved a worker first being displaced from his own job on the basis of his *departmental* seniority, then exercising his *mill* seniority to bump into a job in another department. He acknowledged that in each example mill seniority had only come into play after the worker concerned had been displaced from his own department. Still, Mr. Balina insisted that past practice supported the procedure adopted by the company in the series of layoffs which began in July, 1982, when mill seniority, and not seniority within the department, had been the basis for selection of workers to be displaced from their own department. Balina was evasive when asked whether he had taken Article 34.03 and paragraph 11 of the Trade Apprentice Plan into account in forming his own opinion about the meaning of the collective agreement. Balina acknowledged that the seniority referred to in those provisions of the collective agreement must be departmental seniority and not mill seniority. He acknowledged also that departmental seniority had significance in the case of promotions.

Dick Facca, the current President of Local 132, was asked in chief whether he disagreed with the evidence given by Balina. He said that he did not, but added that Balina's evidence did not go far enough. He proceeded to offer a convoluted interpretation of the relevant provisions of the collective agreement and its application to what he described as a "major mill layoff", which he defined as one in which no employees are retained in any department except the mechanical department. Then, he said, the employees with the most mill seniority who have the qualifications necessary to perform the remaining work in the mechanical department must be retained in preference to those with greater departmental seniority. Indeed, he offered the interpretation that an employee could not be selected for layoff on the basis of departmental seniority unless there was a job in another department into which he could bump on the basis of his mill seniority. These interpretations were based solely on his reading the language of the collective agreement and his understanding of union policy. Mr. Facca did not offer any concrete examples of past practice in the application of these provisions and, particularly, no example of an occasion on which the collective agreement had been applied in a manner both consistent with his interpretation and inconsistent with that of the complainants and the employer.

15. Orest Halushak has been the Industrial Relations Superintendent of the Mission Mill since 1970. Prior to that he was Chief Timekeeper, a position in which he reported to the then Industrial Relations Superintendent. Called as a witness by Abitibi, Halushak could not recall there ever having been a "complete shutdown" of the Mill prior to June 1982, when such a shutdown was first discussed with the trade union. Previous experience with the application of the lay-off provisions in the Mill had been in connection with production cutbacks in which, for example, the mill would switch from a seven-day-per-week continuous operation to a five-day-per-week operation. In those circumstances about forty-five people would ordinarily be laid off. They would be selected for layoff out of their departments on the basis of their departmental seniority. The most junior person would be eliminated. That person would then have the opportunity to bump into a "bottom job" in another department on the basis of his mill seniority if he had the qualifications to perform that job. If the production cutback was indefinite in duration, the layoff would be considered "permanent", and jobs above the "bottom jobs" would also be exposed to bumping on the basis of mill seniority. Based on his experience, Mr. Halushak's understanding was that mill seniority could not be used by an employee to bump back into the department from which the employee had originally been displaced as a result of the layoff.

16. With respect to the shutdown discussed with the union in June 1982, Halushak testified that Balina had had a private discussion with him about that shutdown in early June. Halushak says Balina told him he wanted to ensure that the people with the most mill seniority were retained during the layoff. At that time Halushak understood that this could involve a departure from past practice, but he did not think it would make much practical difference to the company whether it

followed past practice or adopted the approach advocated by Balina. The company had had "poor relations" and "a bad year" in its dealings with Local 132. Halushak considered Balina to be the authorized representative of the members of the local, and was disposed to accommodate what he assumed to be their wishes in an effort to improve relations with the union. Without articulating all these reasons for his agreement, Halushak had told Balina that the company would take the requested approach. The company's willingness to do so was later confirmed in a union-management meeting. Halushak's evidence that Balina's request resulted in the application of mill seniority in the first of the several layoffs in question is uncontradicted.

17. The language of Article 7 and its application to a "complete shutdown" in this mill have not been the subject of any previous dispute between the parties to the relevant collective agreement. The same language has been used in collective agreements between Abitibi-Price Inc. and other locals of the Canadian Paperworkers Union with respect to other mills, however. The application of Article 7 to layoffs from the mechanical department in total or complete shutdowns of the Iroquois Falls mill in 1982 was addressed in an arbitration proceeding between Abitibi-Price Inc. and Local 90 of the CPU by an arbitration Board chaired by Professor McLaren. The evidence with respect to past practice and the arguments with respect to the application of the collective agreement recited in the majority award ("the McLaren award") were substantially the same in that case as in this one:

This Collective Agreement is unusual in that it contains no managements' rights clause. It is also unusual in that much of the parties' understanding and practise in dealing with promotions and lay-offs is based upon past practise built up over many years. Frequently, throughout the Collective Agreement one will find only partial reference to the parties' understanding and practise as will become apparent upon reading this award.

The President of the Union, Mr. Beagan, testifies that it has been the practise, aside from the complete shutdowns under consideration herein, that when there was a decrease in production by reducing the scheduled work days, employees would be moved out of departments on the principle of the last man in the department is the first man out of the department. This is described as departmental seniority, but no clause of the Collective Agreement precisely sets out the practise. An employee who has been moved out of the department may then use mill seniority to bump a junior employee holding bottom jobs in the line of progression within another department. Again, this principle is not precisely found in the Collective Agreement. Article 7.05 is built upon the foregoing principles in that it indicates that there is to be "plant-wide seniority". The Article goes on to state that transfers, which presumes an employee has been bumped out of the department, will have access only to bottom jobs in the line of progression in another department.

In most schedule reductions, the system has worked to give preference to the employees with the greatest plant-wide seniority. It is suggested that it has worked in most scheduled reductions because the Union takes the position that the clauses do not work properly when there is a total shutdown and the Company takes the position that a total shutdown is no different than a reduction in scheduled work days. Testimony reveals that in the past the Collective Agreement has worked because the mill was operating. Article 7.05 contemplates the senior employee moving into another department and having access only to the bottom job in the line of progression in the new department. Article 7.05 then has a super added provision that if that process has not resulted in the most senior employees remaining at work, then "in a permanent lay-off" the Company "will locate other job openings in jobs held by junior employees above the bottom jobs so as to assure continued employment for senior employees".

In a situation where the mill is shutdown, Article 7.05 can operate, but it is to no effect because there are neither bottom jobs or "junior employees above bottom jobs" for which the more senior employees might be able to bump. The problem arises in this case because during the shutdown some of the tradesmen in the mechanical department continued to work. The effect of distinguishing between departmental and mill seniority for these employees was that people with more departmental seniority were able to remain in the mechanical department working while

those with less departmental seniority but more plant seniority were bumped out of the department based on the last in first out principle. Once they had been bumped out of the department, there would be no other jobs than a handful of new security jobs to cover increased patrols during the shutdown. There were no positions into which these mechanical crew employees might bump. In the words of Mr. Beagan, they were "sitting on the bench while more junior employees in total mill seniority were working". This is the cause of the Grievance and is a situation which has not arisen before because there has never been a mill shutdown.

What is at issue in this arbitration is whether the past practise ought to be applied on the theory that a total shutdown is merely a variation of a reduction in the work schedule, as the Company argues, or, whether a new understanding ought to arise. It appears from an examination of Article 7 and other provisions of the Collective Agreement, that the parties have added clauses to this Agreement as necessary to deal with specific situations as they have arisen over the years. The principle lying behind Article 7.05 is to "assure continued employment for senior employees". The Union argues that if that is the principle, then under the circumstances of a plant shutdown, the most senior employees can use their mill seniority within the department to bump the more senior employees in terms of departmental service, but more junior in terms of plant-wide seniority.

18. The McLaren award held that the union's position could only prevail if support for it could be found in the language of the collective agreement. It concluded that there was no such support:

The Union cannot ask a Board of Arbitration to create a new provision in a Collective Agreement. Such a provision must be determined through the negotiating and bargaining process. Both parties are, therefore, forced to turn to the Collective Agreement to find support for their position while recognizing that there is a certain degree of artificiality to that process because the Collective Agreement has not been constructed to take account of the situation. It is the Board's view that the parties must ultimately bargain the resolution of the problem.

What remains for this Board to do is examine the language of Article 7 to determine if the principle of assuming continued employment for the most senior employees can be found to permit the mechanical crews to assert mill seniority over departmental seniority. While this Board recognizes the importance of the seniority principle and the need to protect it; the Board can only do so based upon the language in the Collective Agreement.

The first answer to the Union Grievance is that a total plant shutdown is no different than a reduction in scheduled work days. The reduction which occurs is from operating a given number of days to not operating at all. It is merely a more drastic form of reduction in work days. There is, therefore, no reason based on that fact to operate the seniority provisions and the bumping rights in any fashion which is different from how it has been done in the past when the reduction in scheduled work days has only been of a less drastic nature.

The language in the Collective Agreement supports the process of promotion within a department on the basis of departmental seniority in Clause 7.02. The process of laying off employees is to be on the basis of the last in first out principle in each department as is suggested by the parenthetical phrase at the close of Article 7.04. Then the practise of the most junior employee, having been bumped out of the department using his plant-wide seniority to find bottom jobs in the line of progression of another department, is set out in 7.05. The desire of the Union to go through that practise and then if that has not resulted in the most senior employee remaining at work to permit the employee to return to his department and exercise mill seniority against employees in his own department who have greater departmental seniority can only be asserted through the reference to plant-wide seniority in the opening sentence of Clause 7.05. That language cannot be read in isolation from all of the other provisions of the Collective Agreement and is a statement which is made in connection with the bumping rights associated with an employee who has been bumped out of his department and is now looking for work elsewhere in the mill. There is, therefore, no language to support the Union proposition as argued before the Board. Nevertheless, the Board finds it an anomalous result when the clear intention of the parties in drafting all of Article 7 was, as is indicated in 7.05, "to assure continued employment for senior employees". The Board is, however, without jurisdiction to implement that principle

without more language which would provide the bedrock from which to assert that the members of the mechanical department might use their mill seniority against those employees with greater departmental seniority. For the foregoing reasons, this aspect of the Union's Policy Grievance must be dismissed and it is so ordered by this Board.

19. The parties before us all recognized that we would not be bound by the McLaren award in coming to our conclusions with respect to the issues before us. The complainants and the employer both argued that we should accept the award as persuasive and adopt the analysis in it. The respondents argued that the McLaren award was distinguishable because there is no reference in it to Article 34.03 and because, in counsel's submission, the majority must have made some other findings of fact which are not reflected in the McLaren award itself. I do not see in the award any suggestion that there are facts the majority found critical to the result which were not recited by them in the portions of the award I have quoted here. It is true that the award makes no reference to Article 34.03 nor, indeed, to any other article of the collective agreement between those parties, in dealing with the meaning of Article 7. I am unable to see how that usefully distinguishes the case from the one before us, however, since reference to that article would only add weight to the argument that departmental seniority has some part to play in the interpretation and application of the collective agreement and, particularly, that departmental seniority has some role to play in determining eligibility for promotion and, therefore, layoff, at least within the mechanical department.

21. The word "seniority" appears in various contexts in the collective agreement between Abitibi-Price Inc. and the respondents. The phrase "plant-wide seniority" appears only in Article 7.05. Article 7.01 refers to "seniority", Article 7.02 refers to "the senior man in the department concerned" and Article 7.04 refers to "the older [employee] in the point of service." Article 34.03 speaks of "seniority" as developing exclusively within the mechanical group and to "seniority as journeyman" in the context of eligibility for promotion. If the ambiguity in the meaning or meanings of the word "seniority" in these various provisions is not clear on the face of the collective agreement, it certainly becomes clear from the evidence of the parties' past practice. The evidence discloses that, as of June 1982, the past practice of the parties to the collective agreement applicable to the Mission Mill when applying its provisions with respect to layoffs was the same in all material respects as the past practice dealt with in the McLaren award. I am satisfied that the McLaren award came to the correct conclusion about the meaning and proper application of the language of Article 7 in the case of a "total shutdown" or "major mill layoff." The collective agreement with which we are concerned does not make special provision for those circumstances. Article 7.05 enlarges bumping rights in the case of a "permanent" layoff, but the relevant collective agreement provisions do not otherwise provide different rules for different sorts of layoffs. With respect to the layoffs in question here, I conclude that the provisions of the relevant collective agreement applied in a manner consistent with past practice required that journeymen in the mechanical department be selected for layoff on the basis of their seniority as journeymen within the mechanical department and not on the basis of their mill seniority.

IV

21. Material filed with us by the parties indicates that there were five layoffs between July 1982 and September 1983 during which one or more of the complainants was not scheduled for work but would have been scheduled for work if selection for layoff out of the mechanical department had been based on seniority as a journeyman within the mechanical department rather than on mill seniority. Those layoffs occurred in the weeks of July 25, 1982 and March 20, April 17, July 24 and September 18, 1983.

22. Having regard to the observations in paragraphs 80 and 82 of the initial decision, evi-

dence led during the April hearings in this matter addressed the question whether the company's application of mill seniority in selecting journeymen for layoff during the week of July 25, 1982 was the result of a request from Mr. Balina or anyone else on behalf of the respondents. That evidence clearly established that it was, in fact, the sole result of a request made by Balina in his capacity as president of the local union. Lecuyer and Podlewski did not work during that week, but would have worked had layoffs from the mechanical department been made on the basis of seniority as a journeyman in that department. Acceptance at arbitration of the complainants' interpretation of the collective agreement would not have resulted in recovery of their lost wages, however, since Abitibi could have argued successfully that the union was estopped from seeking to enforce that interpretation in respect of that particular layoff because in effecting that layoff it had acted on Balina's June 1982 request, made with ostensible authority on the union's behalf, that upcoming layoffs be so conducted as to ensure that employees with the most mill seniority remained employed.

23. The complainants' argument with respect to their losses arising out of the July 1982 layoffs proceeded on the assumption, which was not questioned by the union or the Board at the time, that the respondents would be liable to compensate them for those losses if the Board found Abitibi not liable because of a successful estoppel argument. On reflection, that does not seem correct.

24. The earliest union behaviour with which the complainants took issue in this complaint was the union's failure to process grievances arising out of the July 1982 layoffs. Based on the facts as I now have found them, I conclude that those grievances would *not* have been successful if the respondents had processed them through to and including arbitration in a single-minded fashion, with all the resources at their command. That is because the employer could successfully have relied in its defence on Balina's June 1982 request that upcoming layoffs be so conducted as to ensure that the employees with the most mill seniority remained employed. None of the complainants would have recovered compensation. Their failure to do so would not have been the result of the behaviour about which they took issue in this complaint but, rather, the result of Balina's request to Halushak in June of 1982. It has not been alleged that, and the Board has not considered whether, the making of that request constituted a violation of section 68 of the *Labour Relations Act*. The behaviour with which this complaint has dealt is behaviour which occurred after the complainants first began filing grievances. The premise on which our remedial response is based is that honest consideration of those grievances would have led the union to conclude that the complainants' interpretation of the collective agreement was the correct one and, having regard to the union's internal rule about changes to the collective agreement, that that interpretation would have been advocated unless and until an appropriate resolution had been passed to support a changed approach or interpretation. Had the union asserted the correctness of the complainants' interpretation after July 1982, Abitibi might well have conformed to that interpretation in subsequent layoffs and, in any event, could not thereafter have relied on estoppel in a grievance over any subsequent layoff effected on the basis of mill seniority alone. As all of the behaviour found to violate section 68 occurred before the four other layoffs in respect of which damages are claimed, there is clearly a direct link between the complainants' losses, if any, in those layoffs and the breach which was the subject matter of the initial decision. The same cannot be said about the losses claimed with respect to the July 1982 layoffs. In the absence of a claim and a finding that Balina's June 1982 request to Halushak constituted a violation of section 68, we cannot see how the union could properly be held liable to Lecuyer or Podlewski for the wages they would have earned in the week of July 25, 1982, had layoffs that week been conducted in accordance with past practice. As the difficulty I have identified was not addressed in argument, I will consider any written representations thereon which the parties may wish to submit, on a timetable similar to that set out in paragraph 84 of the initial decision.

25. Documentation filed by agreement of the parties indicates that complainant Lecuyer would have worked five days in each of the weeks of March 20, July 31 and September 18, 1983 had millwrights been selected for layoff on the basis of their seniority as journeymen in the mechanical department rather than mill seniority, and would have earned \$589.60 in the week of March 20, 1983 and \$648.40 in each of the weeks of July 31 and September 18, 1983.

26. Polhill would have been scheduled to work five days in each of the weeks of March 20 and April 17, 1983 and two days in the week of September 18, 1983 had the company selected pipefitters for layoff on the basis of their seniority as journeymen in the mechanical department rather than mill seniority. With respect to the weeks of March 20 and April 17, 1983, in each case Polhill elected after the week was over to have it treated as a week of paid vacation. He did this afterwards, rather than beforehand, so that he would be treated as available for work during those periods if the opportunity of additional work arose. Had he booked those weeks as vacation in advance (as he did with respect to some other layoff periods) he would not have been considered for additional work opportunities. As it happens, additional work opportunities did not arise during those two weeks. Having retroactively designated them as vacation weeks, Polhill received vacation pay for those pay periods in an amount equivalent to the wages he would have earned had he been properly scheduled to work in those weeks.

27. The union argues that Polhill has suffered no financial loss for which it should be liable in respect of those two weeks. The collective agreement provides that the taking of vacations is compulsory; they cannot be accumulated, but must be taken in the year when they are due. Had Polhill not designated these two weeks as vacation weeks, he would have been required to take a vacation in two other weeks during which he did work. In the result, the number of weeks in which he could earn wages was not adversely affected by the company's failure to schedule him for work in those two particular weeks. Indeed, Polhill conceded in cross-examination that he had not suffered a loss of earnings. As he put it, he suffered a loss of holidays. One presumes he meant that he had lost some flexibility in the scheduling of his holidays, as well as some of the enjoyment he would have derived from those days away from work had he regarded them in advance as vacation days rather than as days on which he would hold himself ready to respond to any call-in. While Polhill testified in chief that he would not have designated those weeks as vacation weeks had he not been scheduled to work, the use which he would otherwise have made of those two weeks of vacation was not addressed in his evidence. Accordingly, there is very little to on in assigning any monetary value to the loss of flexibility in vacation scheduling. Certainly, I do not accept that two full weeks' wages is the measure of that loss. In the end, I do not propose to assign any monetary value to that loss for this reason: the initial decision of July 23, 1985, directed that the complainants prepare and deliver full particulars of their claim for financial loss by a specified date. Particulars were delivered under cover of a letter dated August 28, 1985. Those particulars did not include a claim on Mr. Polhill's behalf with respect to either of these two weeks. The intention to assert such a claim apparently arose sometime thereafter, and notice that such a claim would be made was only given the day before the April 1986 hearings began. In these circumstances, I do not propose to make any monetary award with respect to this untimely and intangible claim.

28. In his evidence, Mr. Facca stated that there were employees with less mill seniority than Lecuyer and Polhill at work in departments other than the mechanical department during the weeks of March 20 and September 1, 1983. He suggested that those complainants could have mitigated their losses with respect to those weeks had they elected to exercise mill seniority to bump into the jobs performed during those weeks by those other employees. Polhill denies that such opportunities were available either to him or Mr. Lecuyer, stating that the jobs available were not "bottom jobs" within the meaning of Article 7.05. It is aparent that the layoffs on those occasions were not "permanent layoffs" within the meaning of article 7.05, and the respondents have not

established that the work being performed by the persons whom the union claims could have been bumped by the complainants was “bottom job” work of a sort which gave rise to such bumping rights in the circumstances. The onus of proof with respect to an alleged failure to mitigate rests on the party who asserts that there has been such a failure. The respondents have not discharged that onus with respect to the remaining claim for Lecuyer with respect to the week of March 20, 1983 and the claims of Lecuyer and Polhill with respect to the week of September 18, 1983.

29. In the result, I find the respondents liable to pay compensation to Polhill for lost wages in the amount of \$259.36 with respect to the week of September 18, 1983 and to pay compensation to Lecuyer for lost wages in the amount of \$1,886.40, representing \$589.60 for the week of March 20, 1983 and \$648.40 each for the weeks of July 31 and September 18, 1983.

30. The complainants ask that they be awarded interest on lost wages for which they are found entitled to compensation. This is a proper component of compensation, for reasons given by the Board in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35. Beyond reference to that Board decision, no argument was addressed to the method of calculating interest on the amounts awarded. The method described in *Hallowell House Limited*, *supra*, was designed specifically to enable the calculation of interest on awards of compensation for a continuing loss of earnings over an extended period which ends with the order awarding such compensation and costs. The methodology adopted was a “rough and ready” one meant to approximate calculation of interest on each week’s loss from that week to the time the determination is made, so as to avoid the extreme detail which the latter form of calculation would otherwise require. Here we are dealing with a very small number of very discrete losses which occurred on the days some years ago when paycheques would otherwise have been received for the periods in question. Attempting to adapt the *Hallowell* methodology to this type of loss would be more complex than simply taking the more exact approach the *Hallowell* methodology was intended to approximate. By analogy with rules applicable to court proceedings in Ontario, interest should run from the day the loss is suffered or the day written notice of the substantive claim was given to the respondent, whichever is later, calculated at a prevailing interest rate determined with reference to the date proceedings commenced. *Hallowell House* adopted the ‘prime rate’ as determined by the Bank of Canada for the month preceding the month in which the complainant was filed as the relevant interest rate. On that approach, the appropriate interest rate in this case is 11% per annum. The complainants gave notice of their substantive claim on March 14, 1983 (see paragraph 24 of the initial decision), which predates the losses for which compensation is granted here. Accordingly, the respondents shall pay interest on each week’s loss, calculated from the pay day on which the lost wages would have been paid to the date of this decision. Taking that approach, it is unnecessary to divide any sum by two (see Practice Note 13, particularly paragraph 4.) In order to make a precise calculation of interest, we would need to know what was the pay day for the weeks of March 20, July 31 and September 18, 1983. I assume the parties can agree on those dates and make the necessary calculations; the Board retains jurisdiction to determine the precise amounts of interest hereby awarded if the parties cannot.

31. The final matter with which we must deal is the complainants’ claim that an award of compensation should include reimbursement of their legal and other expenses preferable to participation in the Board’s hearings of April 3 and 4, 1986. This claim was first made in the complainants’ counsel’s August 13, 1985 response to the request for submissions contained in the initial decision. Counsel for the complainants wrote:

In the event the Board does decide to make a determination of the meaning of the Collective Agreement, the Complainants submit that it would be consistent with previous Board decisions that the Board order that the Complainants are free to be represented at such a continuation hearing by counsel of their choice and that the Respondents, Canadian Paperworkers Union, Local 132 and Canadian Paperworkers Union, be responsible for all legal costs thereby incurred

by the Complainants including legal fees, subpoena costs, wages lost by the Complainants in attending hearings and any other expenses which reasonably flow in the same manner as if the grievances were being arbitrated.

The superficial attractiveness of this argument stems, in part, from its characterization of what the Board was then considering doing, and subsequently decided to do, as merely taking over a function which might otherwise have been performed by a board of arbitration in circumstances otherwise completely analogous to those in which the Board would ordinarily direct that a union found in breach of section 68 process of the complainants' grievance to arbitration and retained a counsel satisfactory to the complainant to present that grievance at arbitration at the union's expense. That characterization minimizes the very substantial differences between this case and those in which such remedial orders are granted. The Board has not here chosen to act as a mere substitute for a board of arbitration. What we have done is engage in a further hearing with respect to matters of remedy, during which it was necessary for us to interpret the collective agreement in order to determine whether the complainants' interpretation was correct and hence, in accordance with the union's own rules, entitled to the union's support unless and until a change to the collective agreement was authorized by the membership and agreed to by the employer. That was not a question which it had been necessary to determine in order to assess whether section 68 had been breached. It was not a question which, in the circumstances of this case, could fairly have been assessed in an arbitration proceeding in which the union might not have been entitled to assert any interpretation inconsistent with that advanced by the complainants. In other words, with respect at least to layoffs subsequent to July 1982, there was something more to be determined by the Board before it could be said that the matter ought to have gone to arbitration. It seemed likely after our first hearings, and is apparent now, that there would have been little or nothing to an arbitration in which the interests advanced were those of the complainants and the employer, since the complainant and employer appeared to agree on the interpretation of the collective agreement and could have settled all but the company's estoppel defence with respect to the July 1982 layoffs on the basis of that interpretation. Only a very small portion of what we heard April 3rd and 4th would have been heard by an arbitration board in these circumstances, so there can be very little analogy between the complainants' expenses of these hearings and the expenses which might have been borne by the union had there been a referral to arbitration. In short, the analogy with what would have taken place had the case warranted the kind of remedial order made in the other cases cited by the complainants is simply unhelpful, because this was not that sort of case.

32. The other element which makes the complainants' submissions superficially attractive is the same feature which makes all claims for costs superficially attractive: the fact that the complainants have undoubtedly incurred substantial legal and other expenses in proceedings in which they have succeeded. That characteristic is shared by all of the cases in which the Board has been asked to award the successful party "costs" of the proceedings before it. Apart from the question of the Board's jurisdiction to award costs, the arguments in favour of awarding costs to a successful applicant or complainant would have equal force if made by a successful respondent in support of a claim that its costs of proceedings resulting in the dismissal of a complaint against it be paid by the unsuccessful complainant. This Board has repeatedly said that if it does have the power to award costs to a successful complainant, it would be inappropriate to exercise that power when there is no corresponding power to award costs against an unsuccessful complainant: see, for example, *Silknit Limited*, [1983] OLRB Rep. Nov. 1913 at paragraph 8. The nature of the proceedings before us in April, however novel those proceedings may seem, does not warrant a departure from the Board's policy with respect to costs, and I award none here.

33. One matter left outstanding by both the initial decision and the decision of August 29, 1985 is the form of the Notice to Employees contemplated by paragraph 85 of the initial decision. I direct that the respondents forthwith post copies of the attached notice marked "Appendix", duly

signed by representatives of the respondents, on each and every of the bulletin boards and other locations in Abitibi's Mission Mill which are ordinarily available to it for the posting of notices of union business. The respondents shall keep the notices posted for 60 consecutive working days, and shall take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. If the respondents' use of bulletin boards and other locations is subject to a requirement that Abitibi approve the material the respondents propose to post, then Abitibi is hereby ordered to forthwith give the required consent or approval to the posting provided for in this paragraph.

DECISION OF BOARD MEMBER J. A. RONSON;

Respectfully, I must dissent with the reasoning of my colleagues.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE, THE CANADIAN PAPERWORKERS UNION AND ITS LOCAL 132, HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY REPRESENTING GERALD LECUYER, CASH PODLEWSKI AND JOHN POLHILL IN A MANNER WHICH WAS ARBITRARY AND IN BAD FAITH, AND HAS ORDERED US TO INFORM ALL EMPLOYEES IN THE BARGAINING UNIT OF THEIR RIGHTS.

THE ACT GIVES INDIVIDUAL EMPLOYEES THE RIGHT TO BE REPRESENTED BY A TRADE UNION IN A MANNER THAT IS NOT ARBITRARY, DISCRIMINATORY OR IN BAD FAITH, WHETHER OR NOT THEY ARE MEMBERS OF THAT TRADE UNION.

WE ASSURE ALL EMPLOYEES REPRESENTED BY THE CANADIAN PAPERWORKERS UNION AND ITS LOCAL 132 THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THIS RIGHT.

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH IN THE REPRESENTATION OF ANY MEMBER OR EMPLOYEE WE REPRESENT.

WE WILL COMPLY WITH ALL ORDERS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL COMPENSATE GERALD LECUYER, CASH PODLEWSKI AND JOHN POLHILL FOR THE LOSSES, IF ANY, WHICH THEY HAVE SUFFERED AS A RESULT OF OUR BREACH OF THE LABOUR RELATIONS ACT.

CANADIAN PAPERWORKERS UNION
AND ITS LOCAL 132

PER: _____
AUTHORIZED REPRESENTATIVE

PER: _____
AUTHORIZED REPRESENTATIVE

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0424-86-U The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, Complainant, v. **Morewood Industries Limited**, Respondent

Duty to Bargain in Good Faith - Interference in Trade Unions - Remedies - Unfair Labour Practice - Employer failing to meet with union to bargain within 15 day period - Employer engaging in course of conduct intended to thwart any meaningful bargaining - Conduct viewed in context of massive unfair labour practices during organizing drive - Breach of duty to bargain in good faith - Attendance of member of management at union meeting contravening ss.64 and 70 - Employer directed to prepare a collective agreement it is prepared to sign to be presented to union at a meeting with a mediator

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *Frank Manoni* and *Mark Lefebvre* for the complainant; *S. Rosenburgh* and *P. Kane* (for the August 27 hearing date only) for the respondent.

DECISION OF THE BOARD; January 9, 1987

1. In this complaint pursuant to section 89 of the Ontario *Labour Relations Act*, the complainant alleges violations of sections 15, 64, 66 and 70.
2. By decision dated July 31, 1986, the Board set out a number of oral rulings and its ruling on a matter on which it had reserved at the time. In that latter ruling, in brief, the Board did not restrict the complainant's allegations to section 15 (that is, the Board refused to strike out the alleged violations of sections 64, 66 and 70), refused to give an interim ruling as to the interpretation of section 15 and permitted the complainant to amend the complaint to cover events up to and including June 25, 1986 to the extent that the particulars of the impugned conduct of the respondent, apart from evidence regarding the May 31 negotiating meeting itself, were disclosed in the correspondence between the parties.
3. Following continuation of the hearing on August 11, further dates for continuation were fixed in the circumstances set out in the Board's decision of August 21, 1986. That decision gives the Board's reasons for rejecting the respondent's request for alternative dates. When the hearing was to reconvene, the respondent was to commence cross-examination of the second (and final) witness for the complainant, M. Lefebvre. At the August 11 hearing date, the respondent had indicated it intended to call nine witnesses, including S. Rosenburgh, who had thus far represented the respondent.
4. On the day scheduled for continuation, September 27, Rosenburgh failed to appear. The respondent was represented initially by P. Kane who informed the Board he had been retained to seek an adjournment and stated that Rosenburgh was on holiday and could not be contacted except when Rosenburgh chose to telephone counsel's office.
5. After hearing the parties' representations on the adjournment request, the Board ruled orally as follows:

The Board has considered the parties' submissions with respect to the adjournment requested by the respondent. In view of the Board's practice, an adjournment in these circumstances would only be considered by the

Board if both parties consented and Mr. Manoni has indicated that the union is not prepared to do so.

The Registrar set dates for the continuation of this hearing on August 27 and 28 and so notified the parties. Mr. Rosenburgh by telegram requested alternate dates and set out the grounds for that request. The Board, in its decision of August 21, considered those grounds and, for the reasons given, refused the request. This morning, the adjournment request was “renewed”.

If the Board treats this morning’s request for adjournment as a request for reconsideration of the Board’s decision, in the context of the jurisprudence with respect to reconsideration (see for example, *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096), there are no grounds for reconsideration of the August 21 decision in the Board’s view.

Alternatively, the Board could treat the adjournment request this morning solely on its merits, rather than as a “reconsideration” request. On this basis, the grounds include those already noted in the telegram from Mr. Rosenburgh in his request for alternate dates, namely, that Mr. Rosenburgh had commitments during the week of August 25 to 29, and that Rosenburgh’s perception was that no early dates were possible and/or the deadline to inform the Registrar was not firm and/or the dates would be set on consent given the Board’s invitation to the parties to indicate their commitments to the end of December, 1986. Insofar as the grounds for adjournment reiterate the grounds set out in the earlier telegram, the Board adopts the reasoning in its August 21 decision and refuses the adjournment. Insofar as “new” grounds are raised, the Board responds as follows. If a party concludes that a deadline given by the Board for informing the Registrar of commitments is not firm, that party bears the risk of an erroneous conclusion. This supposed error is not a ground for granting the adjournment. Mr. Kane noted that Mr. Rosenburgh was a lay person and suggested the Board should be less rigorous in the standards applied. The Board does not consider this as an appropriate ground for the adjournment request either. The Board indicated to Mr. Rosenburgh during proceedings that representation by counsel was not necessary and that the Board frequently dealt with “unrepresented” parties. However, the Board noted that the Board’s hearings were legal proceedings and a party choosing not to be represented by counsel bore whatever risks that occasioned. The Board sees no basis for concluding that a lay person would regard a Board deadline as “less firm” than counsel would regard such a deadline. Whether lay person or counsel, though, the Board affirms that a party ignores a Board’s direction at its own risk. Here, the company, not the Board or the union, must bear the risk of not meeting the deadline.

Mr. Kane indicated Mr. Rosenburgh would retain counsel if the Board felt the respondent should have counsel and this was another ground for adjournment. The Board notes it specifically did not direct Mr. Rosenburgh to retain counsel. The Board refers to its comments just noted in that regard. The Board also notes that Mr. Rosenburgh requested an adjournment on the first day of hearing in part to retain counsel (see the Board decision of July 31). Mr. Rosenburgh did not do so and represented himself on the second

day of hearing and again on August 11. The Board did not and would not require a party to retain counsel and is not prepared to grant the adjournment on this basis.

In conclusion, the Board rejects the adjournment request. The Board intends to continue this hearing at 1:30 p.m. with the cross-examination of the witness M. Lefebvre or, the Board is prepared to stand down this witness for the time being and the balance of the union's witnesses, if any, and proceed with the examination of those witnesses whom the respondent wishes to call.

6. At the time scheduled for reconvening, respondent's counsel stated he had been unable to contact others in the company who could inform him of all witnesses who were to be called and their expected evidence. Nor had Rosenburgh contacted respondent's counsel. In the circumstances, counsel indicated he could not cross-examine Lefebvre or, with respect to the alternative offered by the Board in its oral ruling, commence the respondent's case. With that, counsel departed and the Board proceeded to hear the argument of the complainant's representative on the merits.

7. The complainant called two witnesses: F. Manoni (who also acted as the complainant's representative) and M. Lefebvre. The Board assessed their testimony according to the usual criteria. Having weighed and assessed the evidence, including the documentary evidence and what appears to the Board as reasonably probable in the circumstances, the Board makes the following findings of fact.

8. The union was certified pursuant to section 8 of the Act on March 6, 1986 (see, *Morewood Industries Limited*, [1986] OLRB Rep. March 346, referred to as the Mitchnik decision). A notice dated March 24, 1986 inviting all bargaining unit members to attend a union meeting on April 1 to select a negotiating committee and generate bargaining proposals was distributed at the plant. The meeting was scheduled to start at 5:00 p.m. F. Manoni, the union organizer, was in the chair and M. Lefebvre, an employee, was also at the head table. About 60 to 70 persons attended. The orderly commencement of the meeting, however, was disrupted by one Robbie Vanderveen. (This individual is referred to as "Robbie Vanderveen" throughout to avoid confusion with "Bram" Vanderveen.) The Board notes that there are several Vanderveens - all related - who work at the plant, including the wife of Bram Vanderveen and a Jeannie Vanderveen. All but Robbie are members of the bargaining unit. Bram Vanderveen had circulated a petition in opposition to the certification application. Robbie Vanderveen was excluded from the bargaining unit as managerial; his position is that of foreman.

9. Manoni asked Robbie Vanderveen to leave as he (Robbie) was a member of management. Robbie Vanderveen refused to leave. Manoni repeated that Robbie Vanderveen was a foreman and could not attend a meeting of bargaining unit employees. Robbie agreed that he was a foreman but stated that, as he was paid on an hourly basis, he could stay. Robbie Vanderveen then asserted that the employees should vote that night to determine whether or not they wanted a union. Manoni responded that the Board had decided that question in granting certification and there was not going to be a vote on that question. Robbie Vanderveen replied, "I don't give a shit about the Labour Relations Board, we want a vote". A small group of employees, including Bram Vanderveen, Jeannie Vanderveen and Mrs. (Bram) Vanderveen were vocal in their support of Robbie. However, when it became apparent Manoni would not direct a vote, most of the group (other than the Vanderveens themselves) started to depart. Robbie directed these persons to remain at the meeting; they did so but stood at the back of the hall. Robbie Vanderveen then quer-

ied Manoni as to the monthly union dues. Manoni replied the dues were the equivalent of two hours per month of earnings. Robbie Vanderveen next asked about the union initiation fee. Manoni stated the fee was \$1.00 now but \$75.00 to join the union later. One member of the group standing at the back of the hall asked of Robbie Vanderveen why Rosenburgh had said that the initiation fee was \$500.00 and monthly dues were \$70.00. Robbie did not reply but asked Manoni how long the employees had to wait before a termination application could be filed. Manoni testified that he was reluctant to answer but Robbie Vanderveen interjected words to the effect "It's twelve months, isn't it? In twelve months we'll vote then and we'll throw you out. We want our own union."

10. Manoni tried to continue with the planned agenda. Other employees also exhorted the "Vanderveen group" to be quiet and let the meeting proceed. Manoni repeated that a member of management should not be present since the union's negotiating committee was to be selected and bargaining proposals discussed. Robbie Vanderveen persisted in his refusal to leave. Manoni then opened nominations for the union negotiating committee and suggested that the employees consider selecting one person from each department to serve on the committee. Persons from the various departments discussed the matter and a name from each department was put forward from the floor. In the presence of Robbie Vanderveen, the following bargaining unit committee was selected: Gerald Bellinger ("Heritage House" section); Peter Elliott (window department); Wyman Calhoun (cabinet department); Mark Lefebvre (machine shop department); Richard Wood (truck drivers); and F. Manoni. Because of Robbie Vanderveen's presence, Manoni suggested that bargaining proposals should not be discussed but, rather, that each negotiating committee member would distribute a survey in their respective departments to determine the bargaining unit members' wishes. That survey form was distributed at the plant and a copy tendered in evidence. The meeting ended at that point.

11. It is appropriate to note that on April 1, shortly before the meeting, Rosenburgh met with the employees in the department where Lefebvre works. Lefebvre characterized the meeting as a "pep" talk by Rosenburgh about the company. One employee asked if everyone had to join the union. Rosenburgh responded that employees did not have to join and that he would get back to the worker on that point. Rosenburgh smiled at Lefebvre and commented that he (Rosenburgh) would have to watch what he said in front of Lefebvre. Rosenburgh also told the group that he was trying to appeal the Board's certification decision.

12. By letter dated April 3, 1986, Manoni informed Paul Kane, who at that time was acting as company counsel, of the presence of a member of management at the April 1 meeting. Manoni protested that conduct, asserted the activity violated the *Labour Relations Act* but stated the union would not file charges at that point "with the hope to establish a fair management labour relationship" and would wait and see if there was repeated interference with the union's rights. The Board notes that Paul Kane was the same individual who subsequently appeared on the respondent's behalf at the last day of hearing (see paragraph 4 above). Manoni also telephoned Kane to relate the April 1 events and mentioned Robbie Vanderveen by name. According to Manoni's uncontradicted evidence, Kane replied to the effect that if Robbie was present, that was improper, but the union would simply have to deal with "Bram" Vanderveen who was a bargaining unit member.

13. In his reply of April 9, Kane appeared to assert that no member of management attended the April 1 meeting and that any objection by bargaining unit members ("Mr. and Mrs. Vanderveen") was a problem the union would simply have to deal with. It is useful to set out that letter, in part:

(Kane to Manoni, April 9, 1986)

You advised me that Mr. and Mrs. Vanderveen were present at your union meeting on April 1st, at which time they raised some questions or objection to the results of the decision of the Ontario Labour Relations Board. I advised you that neither of such individuals were members of management and that objections from any employees covered by the certificate as issued, is a problem which your union is going to have to deal with, as they are your responsibility. To suggest that every complaint you receive from the an employee covered by the certificate was originated and orchestrated by management is a blatant attempt on your part to build up a proper file in anticipation of laying future complaints before the Board. In addition to being self-serving, the employer cannot be responsible for the obvious prejudices which you will be carrying into any future organizational or negotiating sessions in this matter. It is rather early to be anticipating that the employer will not honour its obligations under the Ontario Labour Relations Act nor does it serve any useful purpose to threaten the future filing of complaints for alleged violations under the Act. Please be advised that the employer will not be intimidated in its future dealings with your union by such threats. Based upon inquiries that I have made, I am not aware of any member of management to date, either directly or indirectly, interfering with any activities which you have carried on subsequent to the recent decision of the Board.

14. Manoni responded in writing to Kane's letter. The relevant part of that letter, dated April 14, reads:

(Manoni to Kane, April 14, 1986)

... We are not building up a paper file in anticipation of laying future complaints before the Board. We are asking your cooperation in advising your client not to interfere in our Union business and not to force the Union to file further complaints....

15. Kane's reply of April 18 indicated that the company, not Kane's office, would be negotiating directly with the union and continued:

(Kane to Manoni, April 18, 1986)

The employer did not send any member of management to attend your union meeting on April 1, 1986. I am sure that if a member of management had been present at such a meeting, such an individual would have left if you had requested them to do so.

No one is forcing or encouraging your union to file further complaints before the Board, however, it would appear from the extent and manner of your correspondence that the same is presently contemplated by the union.

16. Notice to bargain was given by Manoni to Rosenburgh in a letter dated April 17 in which sections 14 and 15 of the Act were set out in italicized type. With respect to the first negotiating session, the letter read:

(Manoni to Rosenburgh, April 17, 1986)

Will you please advise of time and place suitable to begin negotiations within the time limits specified by the said section 15 of the Act.

Manoni also wrote to the Registrar on April 24 requesting a Board hearing to resolve the issues of compensation and reinstatement arising out of the Mitchnick award. Rosenburgh's response to that issue and the notice to bargain was as follows:

(Rosenburgh to Manoni, May 2, 1986)

Further to your letter of April 24, 1986, I take great exception to the tone of your letter suggesting that you have not been able to reach me.

In some two months there has been only one call for your union and that was from a Mr. Hark-

ness. I was out of the city at the time and he declined to leave a number or the reason for his call.

We are available to meet with you May 31, 1986 at 2 p.m. We would suggest that a location convenient to your members might be our board room.

Please confirm in writing your acceptance of the above time and location.

With respect to the reference to only one telephone call in two months, Manoni stated that Rosenburgh had insisted that Manoni only communicate with the company in writing, not by telephone, and Manoni had complied as far as possible.

17. During this period, Manoni contacted another principal of the company, P. Lightfoot, in an effort to establish good relations between the parties. Manoni telephoned Lightfoot to arrange a time for coffee. In Manoni's words, he told Lightfoot "If you could meet me, I don't believe you would think I am the devil, I am a human being". The two did meet briefly in early May and discussed the parties' relationship generally. Manoni asked if Lightfoot was going to be on the company negotiating committee; Lightfoot replied that he was not. Manoni also asked why the company had not met within the fifteen days as required by the Act. Lightfoot replied that he didn't know as Rosenburgh was handling all those matters.

18. It is appropriate to set out the next exchange of correspondence in full:

(Manoni to Rosenburgh, May 7, 1986)

Our Union considers your offer of the first negotiation meeting contained in your communication dated May 2, 1986, contrary to the requirements of Section 15 of the Ontario Labour Relations Act.

The Union will be glad to consider any improved offer by your Company, which may demonstrate any sign of good faith negotiations by your Company.

We will appreciate hearing from you and remain,

• • • •

(Rosenburgh to Manoni, May 13, 1986)

Thank you for your letter of May 7. If you are not available for the meeting I have requested please suggest an alternative date.

As indicated to you it is our busy time of year and we will require some flexibility on your part.

• • • •

(Manoni to Rosenburgh, May 15, 1986) (hand delivered)

We acknowledge receipt of your communication dated May 13, 1986.

I like to clarify that I did not say, in my letter of May 7, 1986, that we were not available for the meeting that you had requested, but rather that "our Union considers your offer ... contrary to Section 15 of the Ontario Labour Relations Act" and I indicated to you to improve your offer.

We duly noted that "this is your busy time of the year" and for this reason we would like to implement our legal obligation by negotiating a collective agreement for your employees for the time they work.

In consideration of the offer contained in your communication of May 13, 1986, the Union sug-

gests to meet any and/or every working day of next week from 9:00 a.m. to 5:00 p.m. and to continue during the evenings, if you should make yourself available, until we reach a collective agreement. We would be glad to accept the offered facilities of your Company board room and hope to be able to return your kindness on future meetings.

Please advise.

• • • •

(Rosenburgh to Manoni, May 16, 1986)

We are in receipt of your letter of May 15, 1986.

We confirm our meeting for May 31, 1986 at 2 pm in the boardroom at Morewood.

19. Manoni testified that, in the circumstances and having protested the delay, he felt the union had no choice but ultimately to accept Rosenburgh's date of May 31 for the first meeting in order to get the bargaining underway at all. On May 31, the parties met, as agreed, in the company boardroom. The union negotiating committee was present. Rosenburgh, who arrived a few minutes late, was the sole company representative. Manoni handed Rosenburgh the union's initial proposal and noted some minor corrections. Manoni's comments on the document lasted approximately five to ten minutes. Rosenburgh replied that he needed time to consider the proposal and suggested June 16 as the next meeting date. Manoni objected that the meeting should be sooner. Rosenburgh refused on the ground that he was very busy, that the union document was substantial and he needed the two-week period to prepare the company's proposal in writing. After a few minutes of discussion about a health and safety matter unrelated to collective bargaining, the meeting ended.

20. The parties attended a Board hearing (before a panel differently constituted, referred to as the Satterfield panel) on June 10 with respect to the compensation aspect of the Mitchnick decision. Rosenburgh told Manoni that the June 16 negotiating meeting would have to be cancelled as he (Rosenburgh) could not prepare for both the meeting and the June 10 Board hearing. Manoni disagreed, asserting that Rosenburgh was obligated by the Act to negotiate and the hearing on June 10 was not precluding that bargaining.

21. The next day, Rosenburgh sent the following telegram and letter to Manoni (only the letter is set out as the text is identical).

(Rosenburgh to Manoni, June 11, 1986)

Further to our telephone conversation of last week and our meeting yesterday, please be advised that the negotiation meeting scheduled for June 16, 1986 will have to be rescheduled for the following week.

As we had discussed, since I am the Company's sole negotiator as well as the chief operating officer it was impossible for me to prepare for your complaint before the board as well as review your proposed contract.

Please advise me as to which evening suitable during the week of June 22, 1986 to continue contract discussions.

With respect to our recent offer of employment to Rheel Bourgeois and Mike Hebert this was done without prejudice since both persons were offered employment January 29, 1986 along with the other grievors [sic].

22. The Board notes, in passing, that the June 10 Board hearing was adjourned on a prelim-

inary motion by Rosenburgh. New hearing dates in that regard were eventually set for October 1986. It should also be noted that the June 10 hearing had been scheduled to continue on the following day, June 11.

23. On receipt of Rosenburgh's letter, the union applied for conciliation (on June 16). Manoni again wrote to Rosenburgh on June 17, reluctantly accepting Rosenburgh's date for the next bargaining session.

(Manoni to Rosenburgh, June 17, 1986)

Further to the cancellation of June 16, 1986 negotiation meeting and your advise [sic] to meet the week of June 22, 1986 in the evening, the union has not [sic] other better choice than to meet on Monday June 23, 1986 at 5:00 p.m. Will you please therefore note that the union negotiating committee will be at your office then to continue negotiations.

As you may already know, the union requested conciliation service as it believes the negotiation scheduling is not proceeding expediently. In the mean time we will continue to meet and make every reasonable effort to conclude an agreement.

24. Unfortunately, although the letter spoke of Monday, June 23 as the meeting date, Lefebvre, in leaving a note for Rosenburgh on Friday, June 20, erroneously confirmed the meeting for Tuesday, June 24. Lefebvre realized his error that weekend and called Rosenburgh early on Monday, June 23, to correct the matter. Rosenburgh replied that it was too late as the following telegram and letter had already been sent to Manoni and he (Rosenburgh) would not change the date. (Again, only the text of the letter is set out.)

(Rosenburgh to Manoni, June 20, 1986)

Thank you for your letter of June 17, 1986.

Please be advised that I did not cancel our meeting scheduled for June 16, 1986. As discussed with you on several occasions it was impossible to prepare for contract negotiations and the labour board hearings at the same time.

I am bewildered as to your statement that the negotiations schedule is not proceeding expeditiously. I have before me a request from Mark Lefebvre, your chief union steward, [sic] that he wishes to postpone the Monday June 23rd meeting to Tuesday June 24th. I am quite willing to accommodate this union delay in negotiations even though no reasons have been given.

25. After protest, Manoni agreed to June 24 in a hand delivered letter to the company.

(Manoni to Rosenburgh, June 23, 1986)

Our Union acknowledge [sic] receipt of your telegram and your two letters all dated June 20, 1986. Again I disagree with you. The Union considers your communications offensive and grossly incorrect: The Union has been and is willing, available, capable and desirous to meet and negotiate a collective agreement and compensation for employees, who were found by the Board, fired illegally [sic] by your Company. Since the beginning [sic] of April the Union had the pleasure of meeting you, for such a purpose only once for few minutes, at 2:00 P.M. Saturday, May 31, 1986: you must remember how busy you claimed to be. A simple mistake of a date by Mr. Lefebvre, which was quickly corrected, does not give you the right to declare that the Union is causing delays in negotiations. You have no right to accuse the Union of delaying to pay compensation for time lost to the twelve grievors, only because you just reviewed your files and believe that the Union did not submit all the required informations [sic].

The contents of your communication do not foster harmony necessary to negotiate, but, making every reasonable effort, we will be at your office at 5:00 P.M. on June 24, 1986 to continue negotiation

26. On June 24, Manoni and the union negotiating committee arrived at the company office about 4:45 p.m. for the meeting scheduled for 5:00 p.m. The secretary showed them to the boardroom. Rosenburgh was not there. The union committee waited. Rosenburgh still did not appear nor was there any message as to his expected time of arrival, although he was on the premises. Finally, at 5:40 p.m. the union negotiating committee left. Rosenburgh then sent the following letter to Manoni, dated June 25:

(Rosenburgh to Manoni, June 25, 1986)

It is impossible to continue negotiations if you do not wish to meet. When a meeting is called for 5 PM and you depart at 5:30 PM because the meeting has not commenced, I find that your unwillingness to accept the fact that my responsibilities as negotiator for the company are not my only tasks and that I must also be active in the day to day functions.

It appears that you can no longer act in a professional manner and therefore by copy of this letter, I request that Mr. Harkness appoint a new representative on behalf of the Carpenters and Joiners of America.

27. The Board notes that the union negotiating committee met amongst themselves on several occasions during the period from April 1 and that a second meeting of the bargaining unit employees was held on June 26 to report on the negotiations. No members of management attended that meeting, although Bram Vanderveen was present.

28. The complainant's representative noted that its agreement to proceed first to lead evidence did not alter the burden of proof on the respondent under section 89(5) of the Act. The complainant's representative conceded that, at least with respect to the asserted contravention of section 15, the onus lay on the complainant. The testimony and documentary evidence were reviewed in some detail. With respect to section 15, it was argued that the respondent had acknowledged there was no meeting within the 15 days of the notice to bargain and, on the evidence, there was no agreement to extend that period. That is, the complainant's representative contended the respondent had breached the statutory duty imposed in the first part of section 15. Further, it was submitted the evidence supported a conclusion that the respondent had violated the obligation set out in the second part of section 15 as well, that is, the respondent failed to bargain in good faith and make every reasonable effort to conclude a collective agreement. In this instance, the representative asserted the distinction between "hard" and "surface" bargaining was irrelevant as there had been no bargaining at all, just repeated attempts by the respondent to thwart negotiations. It was submitted that the respondent's conduct not only violated section 15 of the Act but could only be regarded as a deliberate attempt to interfere with the complainant's representational rights. The complainant's representatives reviewed the decision in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, upheld 80 CLLC ¶14,017 (Ont. Div. Ct.) as similar to the instant case on the facts and applicable with respect to the appropriate remedial relief. In this regard, the previous finding that the respondent had committed massive unfair labour practices, as set out in Mitchnick decision was stressed.

29. As noted, Rosenburgh, the company's representative, failed to appear on the day scheduled for continuation and P. Kane, acting as counsel for the respondent on that day, departed after the Board refused the adjournment request. (See paragraphs 4, 5 and 6 above.) The Board herein sets out the submissions of the respondent raised in an earlier objection by the respondent, which touched on the duty to bargain in good faith. The respondent conceded that there had been no meeting within the 15 days of the notice to bargain but asserted the first meeting on May 31 had been set on agreement of the parties and, thus, the complainant had waived that aspect of section 15. It was further asserted that the duty to bargain in good faith and make every reasonable effort to conclude a collective agreement applies only to the conduct of the first and subsequent meet-

ings, that is, solely to the period when bargaining actually commences, and is severable from the duty to meet within 15 days of the notice to bargain.

30. The Board first deals with the duty to bargain in good faith. Section 15 of the Act reads:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

31. The statutory duty to bargain in good faith requires the employer to recognize and solely bargain with the trade union authorized as the bargaining agent of the employees in the bargaining unit and obligates both parties to enter into full, rational discussion of the issues in dispute: *De Vilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49; *Fotomat Canada Ltd.*, [1980] OLRB Rep. Oct. 1397. As stated in *De Vilbiss*, as well, the parties must share an intention to conclude a collective agreement and the employer may not view negotiations as an opportunity to rid itself of the union. In this context, the Board evaluates the conduct of the employer throughout negotiations but also including the employer's responses to the union organizing drive in the certification application. The concepts of "hard" and "surface" bargaining were developed to distinguish between self-interested conduct which coexists with an intention to enter a collective agreement, albeit on as favourable terms as possible, and conduct which is suggestive of merely "going through the motions", for example, in order to so undermine the union that employee support is entirely vitiated: *Radio Shack, supra*; *Fotomat, supra*; *The Daily Times*, [1978] OLRB Rep. July 604; *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356; *T. Eaton Company Limited*, [1985] OLRB Rep. Mar. 491; *Radio Shack, Division of Tandy Electronics Limited*, [1985] OLRB Rep. Dec. 1789.

32. It is useful at this juncture to refer to the following passage from *Radio Shack, supra*:

64. The legal result of these provisions in the context of bargaining is that once a certificate is issued to a union by this Board, an employer cannot embark on negotiations with a view to rewarding or protecting those employees it believes to have opposed the trade union. Such conduct undermines the exclusive bargaining agent status of the trade union and the minority of employees are amply protected by collective bargaining realities and numerous provisions of the Act. They have the right to participate in the affairs of a trade union (section 3) and their views must be considered by the bargaining agent acting on their behalf (section 60). The collective bargaining reality is that any union representing them will require their co-operation in effecting economic sanctions against an employer if negotiations reach the impasse stage. Indeed, ongoing employee dissatisfaction ultimately can manifest itself in the form of an application for decertification. Thus, while it may be tempting for some employers to conduct bargaining with a view to fostering dissension in a bargaining unit by attempting to protect those employees who initially opposed the trade union, it is improper and in violation of the Act to do so. Such conduct interferes with the rightful choice made by the majority of the employees in the bargaining unit, and simply feeds the anxiety of those employees who, for whatever reason, had earlier doubts about the need for or viability of collective bargaining in their workplace.

65. Bargaining with the obvious view of creating and fostering dissension within a bargaining unit, is also a failure to abide by the requirements of section 14 which obligates trade unions and employers alike to "bargain in good faith and make every reasonable effort to make a collective agreement." On numerous occasions this Board has said that the bargaining duty fortifies the employer's obligation to recognize the duly certified bargaining agent of its employees. See generally *De Vilbiss (Canada) Limited, supra*. This means that employer conduct during the bargaining process aimed at undermining the credibility of a trade union in the eyes of the employees not only violates sections 56, 58 and 61, it will also amount to a failure to negotiate in good faith. Section 14 demands that both parties have the common intention of signing a collective agreement provided that they can reach agreement on its terms.

• • • •

74. This brings us to the specific charge that the Respondent has not bargained in good faith and made reasonable efforts to reach an agreement. In discussing the nature of the bargaining duty, we noted the difficulty of distinguishing hard bargaining from conduct which is more in the nature of "going through the motions", and lacking any real intention of signing an agreement - "surface bargaining" if you will. Experience has taught this Board that it must be particularly sensitive to this distinction in first contract situations. Few employers willingly embrace collective bargaining, but most accept the right of the employees to participate in that process and negotiate first agreements with duly certified bargaining agents without rancor or controversy. This, of course, does not mean that all first agreement controversy is a product of anti-union animus or that good faith bargaining in first agreement situations must always end in a contract. Neither proposition would be true. However, the Board and the Legislature of this Province are painfully aware of a number of situations where employers have resisted the organization of their employees by patently unlawful means and the economic dependence of an employee on his employer has been shown to be a very fertile environment for the improper manipulation of employee wishes. Indeed, so delicate is the employment relationship in this respect that the Legislature, in its wisdom, deemed it necessary to enact section 7a, an extraordinary provision which permits the certification of a trade union where, because of improper employer conduct, "the true wishes of employees...are not likely to be ascertained..." Unfortunately, the issuance of a certificate by this Board does not always bring an end to unlawful employer conduct. A trade union is in no more vulnerable a position in many situations than after the issuance of a certificate, particularly where its organizational campaign has attracted the commission of employer unfair labour practices. Some employers are therefore tempted to continue the controversy over recognition in the knowledge that further delay in negotiating an agreement and the spectre of continued employer hostility will demoralize a sufficient number of employees that no collective agreement will need be signed. Accordingly, in order to effectuate the underlying policies of the Act including section 7a, the Board must be most circumspect in applying the bargaining duty to first agreement negotiations. The Board should not conclude lightly that an employer is merely engaging in hard bargaining in such situations or that it is exercising its freedom of speech in communicating directly with bargaining unit employees. The nuances of each case must be considered and earlier employer unlawful conduct may trigger a detailed assessment of bargaining activity. The legitimate concern for "freedom of contract" or "freedom of speech" ought not to blind the Board to abuses committed under either banner, and that strike at other equally fundamental tenets of the legislation.

33. With that background, the Board turns to the instant case. Firstly, the Board rejects the assertion by the respondent that the duty to meet within fifteen days is severable from the duty to bargain in good faith and make every reasonable effort to conclude a collective agreement. Such an interpretation flies in the face of the legislative purpose of the section. The obligation in the latter part of section 15 is triggered once the notice to bargain is given; to hold otherwise would create a period wherein the employer's conduct is free from scrutiny under section 15.

34. During the hearing, the respondent appeared to suggest that there had been an agreement by both parties to defer the first negotiating session to a date beyond the fifteen-day period. The Board does not agree. It is clear from the correspondence that, in giving notice to bargain dated April 17, 1986, the union specifically set out the text of section 15 of the Act, wished to meet within that period and, later, protested the date selected by the respondent. That the union felt compelled to ultimately comply with the respondent's insistence on the May 31 date in order to commence bargaining at all does not constitute an agreement to extend the statutory period for the initial negotiation session. The respondent called no evidence to explain the delay. Accordingly, the Board finds that the respondent contravened section 15 of the Act in failing to meet within the fifteen-day period.

35. The respondent did not merely postpone the commencement of negotiations. Rather, it is apparent that the initial delay was but the first step on a course intended to thwart any meaningful bargaining. The first negotiating session lasted no more than a few minutes: the union delivered its proposals, with a few minor corrections. The respondent told Manoni time was needed to study the proposals and prepare a written response. However, the respondent next sought to force the

union to choose between proceeding with the Board hearing scheduled for June 10 and 11 (before the Satterfield panel) to deal with the issue of reinstatement and compensation arising out of the Mitchnick decision and proceeding with the second negotiating session scheduled - at the respondent's insistence - for June 16. Then, having succeeded in obtaining an adjournment of the Board hearing on June 10, the respondent cancelled the June 16 session in any event.

36. The respondent also sought to shift the blame for any difficulties onto the union and Manoni in particular. For example, in his letter of May 2, Rosenburgh castigated Manoni for there not being more than one telephone call from the union in two months, notwithstanding Rosenburgh's insistence that all exchanges were to be in writing only. The respondent consistently portrayed the union's protestations as "frivolous", as attempts to build a "paper file" for complaints with the Board. The difficulty in finalizing the June 24 meeting date neatly illustrates the two elements of the respondent's strategy to thwart negotiations, namely, delay and an aggressive stance to shift the blame to the union. Manoni's letter stipulated Monday, June 23, as the date for the second bargaining session; Lefebvre erred in his note to Rosenburgh by referring to Tuesday. Rosenburgh immediately seized on the mistake and sent a telegram and letter to the union depicting the company as "acceding" to the union's change of plan. Rosenburgh then refused to change the date back to Monday. Again, the respondent did not offer any explanation to the Board as to why the meeting could not be held on the Monday. Finally, the respondent did not even appear at the time scheduled for the June 24 meeting. The union waited for forty minutes before leaving. The only reasonable inference from the evidence is that Rosenburgh fully intended to humiliate the employees's bargaining agent, in circumstances where the humiliation would be public knowledge within the plant, and, thereby, undermine employee support for the union.

37. The conduct of the respondent following notice to bargain must be viewed in the context of massive unfair labour practices committed by the respondent during the union organizing drive, including the dismissal of a number of employees contrary to the Act. The unfair labour practices were so serious that certification was accorded the union pursuant to section 8 of the Act. The Board need not detail that earlier misconduct, set out in the Mitchnick decision, but, in the Board's view, the respondent's entire pattern of behaviour amply illustrates the concerns referred to in the excerpt quoted from *Radio Shack, supra* (see paragraph 32 above).

38. Rosenburgh is the president of the respondent and is clearly the guiding mind of the respondent. Further, Rosenburgh is the sole negotiator for the company. Rosenburgh repeatedly stressed his dual role as president and sole negotiator to Manoni to justify the difficulty in arranging meetings, the delays and cancellations. Rosenburgh's position was that the union just had to accept that situation. The Board does not agree. While each party is free to select its negotiators, that right cannot be used to subvert the collective bargaining process. The negotiators must be reasonably available to meet and discuss the issues in dispute in order to satisfy the statutory requirement that both sides make every reasonable effort to reach a collective agreement: *Fotomat Canada Limited, supra*. The respondent's conduct, taken in its entirety, contravenes this aspect of the duty to bargain in good faith as well.

39. In summary, then, the Board finds that the respondent has violated its statutory obligation imposed in section 15 of the Act to meet within 15 days from the giving of notice to bargain and to bargain in good faith and make every reasonable effort to conclude a collective agreement.

40. The Board next turns to the remaining allegations. In this regard, the Board notes that, while a violation of section 66 was alleged in the complaint filed with the Board, the union withdrew this aspect as it related to persons already the subject of a Board order in the Mitchnick decision. Sections 64 and 70 of the Act are considered herein. Those provisions read:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

41. In the Board's view, the union's documentary and *viva voce* evidence supports a finding that the respondent contravened both sections 64 and 70. The Board reiterates its earlier comments that the respondent conducted negotiations so as to undermine the union with the ultimate aim of vitiating the support of the employees for their bargaining agent. That is, the delay in the commencement of negotiations and setting further dates, the cancellation of the June 16 negotiating meeting and the failure to appear at the time scheduled for the June 25 bargaining session also constitute a violation of section 64. Moreover, the Board must consider the events of the April 1 meeting which Robbie Vanderveen attended. Robbie Vanderveen's presence at the April 1 meeting was vigorously denied in the letters of April 9 and April 18 from Kane, then acting as respondent's counsel. It may well be that Kane was misled by the respondent as to the true facts. At the hearing, though, Rosenburgh conceded that Robbie Vanderveen had attended the union meeting. The notice of meeting was addressed to all bargaining unit members. Robbie Vanderveen was a member of management. The respondent did not call Robbie Vanderveen to explain his presence and conduct at the meeting. The only reasonable inference from the evidence before the Board is that Robbie Vanderveen's conduct at that meeting was disruptive and intended to be so. In the Board's view, the respondent, through one of its management personnel, intentionally interfered with the trade union's representational rights and sought to intimidate and coerce employees with respect to their support of the union and the exercise of their rights under the Act. The details of the April 1 meeting are set out in paragraphs 8, 9 and 10 and need not be repeated at this point except to note that Robbie Vanderveen, notwithstanding the Board's certification of the union, sought to reopen the issue of certification, held out the prospect of a termination application and the formation of the "employees' own union" at the earliest possible date and ordered a group of bargaining unit employees to remain in the hall to support his attack on the union. Robbie Vanderveen's presence at the meeting, his continuing refusal to leave and the conduct just noted all constituted contraventions of sections 64 and 70 of the Act by the respondent. This conduct may be regarded as a variation on the usual "surveillance" cases but the consequences are no less pernicious in terms of the "chilling effect" on the employees: *K Mart Canada Ltd. (Peterborough)*, [1981] OLRB Rep. Jan. 60; *Radio Shack, supra*; *Securicor Investigation and Security Ltd.*, [1983] OLRB Rep. May 720; *Robin Hood Multi-Foods Inc.*, [1981] OLRB Rep. July 972. It is difficult to conceive of a more flagrant violation of sections 64 and 70 than the attendance of a member of management at a union meeting, to which all bargaining unit members have been invited, called to select a negotiating committee and discuss union bargaining proposals.

42. The Board's authority to fashion an appropriate "make-whole" remedy is beyond dispute. That remedial authority is broad and must adequately compensate for the effects of the particular misconduct in each case. In this instance, the Board has found the respondent violated sections 15, 64 and 70 of the Act. Those violations are serious and strike at the heart of the respondent's obligations under the Act to recognize and deal exclusively with the employees' bargaining agent. The Board considers that declarations to that effect coupled with cease and desist orders and a posting are insufficient to deal with the pernicious consequences of the respondent's conduct on the recognized bargaining agent and the employees. These violations represent a con-

tinuation of the respondent's earlier widespread unfair labour practices found in the Mitchnick decision. Quite simply, the respondent has not modified its behaviour following the certification of the union; the respondent has merely changed its tactics. Its goal remains the vitiation of employee support for their bargaining agent and the ousting of the union. The Board adopts the reasoning in *Radio Shack, supra*, with respect to the redressing of monetary losses incurred by the union and the need for 'a reasonable opportunity for the union to recapture the earlier momentum' that sparked the certification application.

43. In *Radio Shack, supra*, the Board concluded it had no authority to impose a collective agreement. That case predated the recent amendments to the Act providing for first contract arbitration. However, what is before the Board at this juncture is not an application for first contract arbitration. Therefore, the Board must endeavour to devise a remedy for the unfair labour practices to put the collective bargaining process "back on track". In the Board's view, this requires the assistance of a mediator. Accordingly, the respondent is directed to prepare a complete collective agreement proposal consonant with the duty to bargain in good faith and which it is prepared to sign. That proposal shall be presented and explained at a negotiating meeting convened as directed by a mediator appointed by the Ministry. The parties shall continue to meet as directed by the mediator to negotiate a collective agreement in accordance with the obligation imposed by section 15 of the Act. Further, in order to rekindle employee support, the remedial relief must provide for meaningful access by the union to the employees at the plant.

44. In conclusion, the Board hereby:

- (a) declares that the respondent has violated section 15 of the Act in failing to meet within 15 days of the notice to bargain and in failing to bargain in good faith and make every reasonable effort to conclude a collective agreement;
- (b) declares that the respondent has violated sections 64 and 70 of the Act in that a member of management attended and sought to disrupt a union meeting and in that the respondent sought to undermine the union and vitiate employee support for their bargaining agent through intimidation, coercion and interference with the union's representational rights;
- (c) directs the respondent forthwith to cease and desist from further violations of the Act and to bargain in good faith and make every reasonable effort to conclude a collective agreement;
- (d) directs the respondent, within ten days of the issuance of this decision, to prepare a complete collective agreement proposal consonant with the duty to bargain in good faith and which it is prepared to sign; further, directs the respondent to present and explain that proposal at a negotiating meeting convened as directed by a mediator appointed by the Ministry; the parties shall continue to meet as directed by the mediator to negotiate a collective agreement in accordance with the obligation imposed by section 15 of the Act;
- (e) directs the respondent to provide union representatives for a period of two years from the date of this decision with reasonable access to all employee notice boards at the respondent's premises for the posting of union notices, bulletins and other union business literature to facilitate the information flow in the work place from the union covering all

aspects of collective representation and collective bargaining negotiations;

- (f) directs the respondent forthwith to provide the union for a period of two years from the date of this decision with the names, addresses and telephone numbers of all employees in the bargaining unit represented by the union; such list is to be kept updated on a monthly basis;
- (g) directs the respondent forthwith to permit union representatives to convene a meeting at the respondent's premises during working hours which all bargaining unit members are to attend, and for which they shall be paid; that meeting is to last up to two hours and no member of management may attend;
- (h) directs the respondent to pay all of the monetary losses of the union and bargaining unit employees, together with interest, which may reasonably be proved as arising from the respondent's breaches of the Act as found herein, including the loss of opportunity to negotiate a collective agreement;
- (i) directs the respondent forthwith to post copies of the attached notice, marked "Appendix", after being duly signed by an authorized representative of the respondent, in conspicuous places where they are likely to come to the attention of employees, and to keep the notices posted for 60 consecutive working days; reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material; reasonable physical access to the premises shall be given by the respondent to a representative of the union so that the union can satisfy itself that this posting requirement is being complied with.

45. The Board remains seized to deal with any disputes concerning the implementation of this decision.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

To ORGANIZE THEMSELVES;

To FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

To ACT TOGETHER FOR COLLECTIVE BARGAINING;

To REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL BARGAIN IN GOOD FAITH AND MAKE EVERY REASONABLE EFFORT TO CONCLUDE A COLLECTIVE AGREEMENT.

WITHIN TEN DAYS OF THE ISSUANCE OF THIS DECISION, WE WILL PREPARE A COMPLETE COLLECTIVE AGREEMENT PROPOSAL CONSONANT WITH THE DUTY TO BARGAIN IN GOOD FAITH AND WHICH WE ARE PREPARED TO SIGN.

WE WILL PRESENT AND EXPLAIN THAT PROPOSAL AT A NEGOTIATING MEETING CONVENED AS DIRECTED BY A MEDIATOR APPOINTED BY THE MINISTRY AND SHALL CONTINUE TO MEET AS DIRECTED BY THE MEDIATOR TO NEGOTIATE A COLLECTIVE AGREEMENT IN ACCORDANCE WITH THE OBLIGATION IMPOSED BY SECTION 15 OF THE ACT.

WE WILL PROVIDE UNION REPRESENTATIVES FOR A PERIOD OF TWO YEARS FROM THE DATE OF THIS DECISION WITH REASONABLE ACCESS TO ALL EMPLOYEE NOTICE BOARDS AT THE COMPANY PREMISES FOR THE POSTING OF UNION NOTICES, BULLETINS AND OTHER UNION BUSINESS LITERATURE.

WE WILL PROVIDE FORTHWITH TO THE UNION FOR A PERIOD OF TWO YEARS FROM THE DATE OF THE BOARD'S DECISION WITH THE NAMES, ADDRESSES AND TELEPHONE NUMBERS OF ALL EMPLOYEES IN THE BARGAINING UNIT REPRESENTED BY THE UNION; SUCH LIST WILL BE KEPT UPDATED ON A MONTHLY BASIS.

WE WILL PERMIT FORTHWITH UNION REPRESENTATIVES TO CONVENE A MEETING AT THE COMPANY'S PREMISES DURING WORKING HOURS WHICH ALL BARGAINING UNIT MEMBERS ARE TO ATTEND, AND FOR WHICH THEY SHALL BE PAID; THAT MEETING WILL LAST UP TO TWO HOURS AND NO MEMBER OF MANAGEMENT WILL ATTEND.

WE WILL PAY ALL OF THE MONETARY LOSSES OF THE UNION AND BARGAINING UNIT EMPLOYEES, TOGETHER WITH INTEREST, WHICH MAY REASONABLY BE PROVED AS ARISING FROM OUR BREACHES OF THE ACT, INCLUDING THE LOSS OF OPPORTUNITY TO NEGOTIATE A COLLECTIVE AGREEMENT.

WE WILL FORTHWITH POST COPIES OF THIS NOTICE, MARKED "APPENDIX", AFTER BEING DULY SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE COMPANY, IN CONSPICUOUS PLACES WHERE THEY ARE LIKELY TO COME TO THE ATTENTION OF EMPLOYEES AND WILL KEEP THE NOTICES POSTED FOR 50 CONSECUTIVE WORKING DAYS AND WILL TAKE REASONABLE STEPS TO ENSURE THAT THE NOTICES ARE NOT ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

WE WILL GIVE REASONABLE PHYSICAL ACCESS TO THE PREMISES TO A REPRESENTATIVE OF THE UNION SO THAT THE UNION CAN SATISFY ITSELF AS TO COMPLIANCE WITH THE POSTING REQUIREMENT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

MOREWOOD INDUSTRIES LIMITED

PER (AUTHORISED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0414-85-R Union of Bank Employees (Ontario) Local 2104, Canadian Labour Congress, Applicant, v. National Trust, Respondent, v. Group of Employees, Objectors

Bargaining Unit - Certification - Practice and Procedure - Whether Administration Officers and Assistant Branch Managers of trust company exercise managerial functions - Administration Officer Trainees excluded from unit on community of interest grounds - Original panel of Board not seized with remaining issues - Board reviewing its policy concerning the jurisdiction of any panel to consider outstanding issues in certification applications

BEFORE: *R. Herman*, Vice-Chairman, and Board Members *W. G. Donnelly* and *D. A. Patterson*.

APPEARANCES: *Steven Barrett* for the applicant; *Brian Burkett*, *Sharon Scott* and *Clare Fitzgerald* for the respondent; *Jenny Kokkas* and *Lillian Byrne* for the objectors.

DECISION OF THE BOARD; January 7, 1987

1. This is an application for certification involving seven of the branch offices of the respondent National Trust in Metropolitan Toronto. The Board has issued two prior decisions in this matter, but the hearings before the present panel were to entertain the submissions of the parties with respect to the Board Officer's report examining numerous "employees" of the respondent, and with respect to whether the original panel of the Board which issued the two prior decisions ought to deal with all outstanding issues.

2. In the first decision issued by the Board, differently constituted, on February 28, 1986, [1986] OLRB Rep. Feb. 250, the Board described the structure of the respondent's 37 branch offices across Metropolitan Toronto, and the three-tiered management structure operating throughout that region (cf. paragraphs 1 to 8 of that decision). Paragraph 5 of that decision reads as follows:

The respondent has a three-tiered management structure featuring a Branch, Region, and Head Office level. The agreed statement of facts presented by the parties to the Board notes that:

The term and conditions of employment for the employees are established by Head Office at National Trust and implemented at the branch level by the Branch Manager with the approval of the appropriate Regional Office.

The full-time employees at National Trust in Toronto have common terms and conditions of employment in terms of hours of work, salary levels, fringe benefits, vacation schedules, paid holidays, overtime, leaves of absence, absenteeism, hirings, terminations, discipline, transfers, promotions and demotions.

Branch Managers are responsible for the financial administrative and personnel functions at the branch. Branch Managers are responsible for the financial administrative and personnel functions at the branch. Branch Managers are required, as a matter of written policy, to either involve or obtain the approval of Regional Office and/or Head Office with respect to a wide range of employment matters including hours of work, salary levels, fringe benefits, vacation schedules, paid holidays, overtime, leaves of absence, absenteeism, hirings, terminations, discipline, transfers, promotions and demotions.

Branch Managers are responsible for the financial administrative and personnel functions at the branch. Branch Managers are required, as a matter of written policy, to either involve or obtain the approval of Regional Office and/or Head Office with

respect to a wide range of employment matters including hours of work, salary levels, fringe benefits, vacation schedules, paid holidays, overtime, leaves of absence, absenteeism, hirings, terminations, discipline, transfers, promotions and demotions. In many instances, Branch Managers make effective recommendations to Regional or Head Office with respect to most of the employment matters listed above.

Performance evaluations of employees at National Trust are undertaken at the branch level by the Branch Manager. In many instances, Branch Managers make effective recommendations to the Regional Office with respect to the performance rating of employees in their Branch, Performance evaluations are reviewed at Regional Office and Head Office where responsibility resides for the final performance rating of each employee.

Six of the branches in question here perform National Trust's normal savings and loan function, while the seventh performs a savings function only.

The skills, training and nature of the work of the employees who perform a savings function at National Trust is similar from one location to another.

3. As can be seen from the excerpt from that prior decision, each of the seven branches in question before us is managed by a Branch Manager, whom the parties have agreed is excluded on the basis that he or she exercises managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*, and in each of the respective branches the person below the Branch Manager on the hierarchy is referred to as either Assistant Branch Manager or Administration Officer. The current composition of the respondent employer reflects a merged entity, as a merger was effected on September 1, 1984 between Victoria & Grey Trust Company, which referred to the second-in-command at each branch as Administration Officer, and National Trust Company, which referred to such individuals as Assistant Branch Managers. For our purposes in this proceeding, the two terms are interchangeable, as we are asked to decide whether in our opinion, each of the seven individuals, one in each branch, who are either Administration Officers or Assistant Branch Managers, exercise managerial functions within the meaning of section 1(3)(b) of the Act, and therefore cannot be considered "employees" for purposes of the Act. The applicant contends that all seven of these individuals exercise managerial functions, and therefore ought to be excluded from any bargaining unit(s) subsequently determined to be appropriate (whether one or more bargaining units are appropriate are matters remaining to be canvassed as set out in the Board's decision of February 28, 1986). The applicant specifically withdrew its prior submission that on community of interest grounds as well, these individuals ought to be excluded from the bargaining unit(s). The respondent in turn contends that all seven of the Assistant Branch Managers or Administration Officers do not exercise any managerial functions, or if they do they are so incidental to their overall duties and responsibilities, that all seven individuals ought to be included within the described bargaining units. Apart from the resolution of the status of the seven individual Assistant Branch Managers (we may refer to them by this generic term for simplicity's sake) there is a group of individuals being trained to become Assistant Branch Managers or Administration Officers, referred to as Administration Officer Trainees, and the applicant contends that this group of individuals ought to be similarly excluded from the unit on section 1(3)(b) grounds, or alternatively, in the case of these trainees, on community of interest grounds. Similarly, the respondent submits that regardless of the Board's decision with respect to any or all of the Assistant Branch Managers, the Administration Officer Trainees both share a community of interest with the full-time employees in the bargaining unit and do not exercise any managerial functions and therefore ought to be included within the bargaining units.

4. The respondent points to the merger in September of 1984, and notes that Victoria & Grey emerged as the dominant party from that transaction. Victoria & Grey, prior to the merger, had used Administration Officers, individuals who were officers only for administrative purposes

and in no way exercised managerial functions, and subsequent to the merger its hierarchical structure and operative methods were gradually permeating throughout the Metropolitan Toronto system. In the respondent's submission therefore, while certain individuals, either formerly or currently described as Assistant Branch Managers, might have exercised managerial functions, the trend for the imminent future was clearly to reduce any such managerial duties and responsibilities and to move towards the Victoria & Grey "Administration Officer" model. The respondent further suggests that the evidence shows that by the application date the Victoria & Grey approach had effectively taken over in all branches. In those branches where the Board might find managerial responsibility percolates below the level of the Branch Manager, the respondent asserted that any such managerial responsibilities were dispersed throughout many individuals in each branch, and not merely the Assistant Branch Managers, including the exercise of limited managerial responsibilities by, for example, the Administrative Assistant and the Head Teller.

5. Before turning to the Board Officer's report, and the review of the evidence and our conclusions, a few preliminary comments are in order. All parties agree that the relevant time that the Board must look to, in order to assess whether the seven individuals in question exercise managerial functions, is the application date, regardless of whether a trend subsequent to that date might change the duties and responsibilities of those individuals. Secondly, the parties agreed that the Board must look at each branch on an individual basis, and each of the Assistant Branch Manager's duties and responsibilities on an individual basis, rather than attempting to assess whether the category of Assistant Branch Manager generally entails individuals exercising managerial duties. It was necessary to look at the individuals for several reasons. Unless parties can agree that an individual examined is representative of the entire category, which the parties specifically dispute in this proceeding, the Board must necessarily look at each individual in the category and assess whether that particular individual does in fact exercise managerial functions at the relevant time. At this stage it is not clear which of the seven branches will be included in the bargaining unit to be determined, and it is not therefore clear which of the Assistant Branch Managers might be affected by this application. If only four branches are found to be certifiable and are ultimately included within a bargaining unit, had the Board considered the duties and responsibilities of the Assistant Branch Managers at the other three branches and relied upon that evidence in reaching a conclusion with respect to those individuals at the four branches included within the bargaining unit, the Board would arguably be considering evidence extraneous to and irrelevant to consideration of those individuals affected by the bargaining unit determined to be appropriate. Thirdly, the applicant specifically withdrew its argument on the basis of community of interest with respect to the Assistant Branch Managers, an argument which would have caused the Board to look at the entire category. In the face of these factors, the Board considered the evidence with respect to each individual Assistant Branch Manager and has reached a conclusion with respect to each such individual.

6. It must be remembered that the parties have agreed that within each branch managerial authority does reside, for they have agreed that Branch Managers are excluded on the ground that they exercise managerial functions. When viewing the evidence the Board must remain cognizant of this factor, and submissions suggesting that little to no managerial authority remains at the branch level, given the supervising and co-ordinating function of Regional Office, must be assessed in light of the parties' agreement that there is managerial authority exercised within each branch. Collective bargaining and other concepts dealt with by the *Labour Relations Act* are a relatively new presence in the banking or trust company industry, and the Board must take account of the particular contexts and factors at play therein in assessing whether individuals exercise managerial functions. More particularly, the evidence strongly suggested that, at least in certain branches, the Branch Manager and Assistant Branch Manager ran the branch together, and could be accurately described as a "management team". Where the evidence established such a team approach, and

given the parties' agreement that the Branch Manager exercised managerial functions, the only reasonable inference was that the Assistant Branch Manager similarly exercised such functions. To conclude otherwise, in appropriate circumstances, would be to cut against the very rationale for excluding such individuals in the first place (see for example *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84). With these observations in mind we turn to the evidence and to consideration of whether the individual Assistant Branch Managers exercise managerial functions within the meaning of section 1(3)(b) of the Act.

7. As of the application date, Anna Micieli had been an Administration Officer for approximately twelve years. In the Board's opinion any managerial functions Micieli exercises are clearly incidental to her general duties and responsibilities and are not such as ought to justify her exclusion from the bargaining unit. Although she described herself as responsible for the entire office, she also indicated she operated under the Manager's direct supervision, and never does anything involving managerial duties unless referring such to the Manager. Her role could accurately be described as involving almost entirely administrative supervision and organization, rather than managerial. Although she prepares the work schedules for the other employees in the branch, with the assistance of the Savings Supervisor, they are prepared subject to the Manager's subsequent approval. She has no involvement in hiring, or disciplinary matters, nor does she make effective recommendations with respect to either type of decision. All managerial aspects of her job are done on the clear understanding that the Manager's approval is necessary and on the basis that such approval is in fact sought. She did indicate that she has limited input with respect to evaluations of fellow employees, but is not involved in the actual decision making, nor does she make effective recommendations. Only two aspects of her job suggest attributes of managerial responsibility. First, in appropriate circumstances she can and does on her own initiative give an employee a short period of time off in order to, for example, go to the airport to pick up a relative. Such duties are in the Board's opinion incidental to the general nature of her job functions. Secondly, the branch in question operates on a six-day work week, and because of the staggered work schedules of the Branch Manager and Micieli, she is the senior employee in charge of the branch one day every week. Parenthetically we note such is also true of the Assistant Branch Managers of the other six branches in question. If the evidence established that during that "sixth-day" when Micieli is in charge of the branch, she exercises such managerial functions as the Branch Manager exercises when present, one could readily infer that the branch is managed by a team consisting of the Assistant Branch Manager and Branch Manager, and that the Assistant Branch Manager exercises managerial functions. However, the evidence concerning Micieli suggested the precise opposite. Anything that occurs on the sixth day when the Manager is not present, is either referred to Regional Office by Micieli for their resolution, or alternatively, she in effect "babysits" the problem until the Manager returns on the following work day in order for the Manager to handle it herself. Other aspects of Micieli's duties and responsibilities, while they might speak of managerial functions in an industrial setting, suggest in this context the expected sorts of interaction one finds in professional or semi-professional settings. Just as registered nurses or R.N.A.'s are expected to help train and monitor other employees, without attracting managerial responsibility, similarly one finds that all Assistant Branch Managers help train and monitor employees below them in the hierarchy, and similarly without in the Board's opinion attracting managerial attributes.

8. Contrasting with the situation of Micieli, Franca Fata, an Administration Officer of approximately three years' duration, does exercise managerial duties and responsibilities in the Board's opinion. In her branch the Branch Manager and she together and jointly both run the branch and exercise managerial responsibilities. One day a week Fata is not only the senior employee present, due to the Manager's absence according to the established schedules, but she is "in charge", in the sense that she steps into the shoes of the Manager and deals with problems as the Manager would have had the Manager been present. Fata sends monthly reports to Regional

Office, without necessarily showing the reports to the Manager for his prior approval. Even when the Manager is present, she conducts weekly staff meetings, and together with the Manager deals with employee staffing and labour relations problems, and attempts to solve them. With respect to hiring, approximately 90 percent of the interviewing is done by Fata herself, without the Manager present. It can only be inferred that she has effective recommendation power with respect to the hiring of such employees. Fata has access to all personnel records of the employees in her branch, and reviews these personnel records when necessary or appropriate, presumably in order to deal with personnel problems. Fata is responsible for performance and evaluation reviews of the other employees in the branch, and she testified that her Manager generally accepts her evaluation reviews. As she described it, her Manager prefers as a general proposition that she run the branch, with input to him where necessary. In the Board's opinion Fata exercises managerial functions, both during those times when the Manager is present and on the sixth day when she runs the branch alone, and is therefore excluded from the bargaining unit.

9. Nasim Murji has been an Administration Officer for approximately a five-year period. Unlike Fata, Murji does not in effect "run the branch" on the sixth day when the Manager is not present. To the contrary Murji deals with matters arising on that sixth day as Micieli did in her respective branch. Murji either refers matters needing managerial treatment to Regional Office for its consideration and response, or alternatively tries to defer consideration of such matters until the Manager returns. Although Murji felt that she had the authority to discipline employees, the evidence suggests she exercised such authority by reporting disciplinary problems to the Manager and keeping the Manager informed, rather than dealing with the disciplinary matters herself. Other supervisors in her branch had similar authority to inform the Manager and to control and monitor the work place. She has some input into appraisals of other employees, but so do all supervisors in the branch, as one expects in a banking or trust company setting. Any managerial attributes exercised by Murji are in the Board's opinion quite incidental to her job and we find that Murji is an employee for purposes of the Act and is included within the bargaining unit.

10. Christine Magnifico has been an Administration Officer for approximately four years. Without reviewing the evidence in any detail, the Board concludes that Magnifico does not exercise managerial functions and accordingly she is included within the bargaining unit. None of her duties appear to involve her exercising any independent decision-making authority, nor does she make effective recommendations with respect to any of the duties or responsibilities normally associated with management. She is more accurately described as her title suggests, an Administration Officer, and any actual decision-making affecting the employment relationships of fellow employees is referred to the Manager or Regional Office.

11. Carole McMahon does exercise effective recommendation power, and additionally, is part of the management team, along with her Manager, that jointly runs the branch. She regularly discusses problems with employees, and attempts independently to try to resolve such problems. Such problem solving may well involve discussions with the Manager over the appropriate disposition, but she and her Manager both deal with the problem. In regularly evaluating fellow employees, she and the Manager on occasion jointly interview the employee being evaluated, and she is sometimes asked to do a written evaluation, which the Manager relies upon in reaching a final evaluation. On balance the Board is satisfied that during the sixth day when the Manager is not present, McMahon effectively runs the branch and makes managerial decisions should the occasion demand. Such decision-making may well involve contacting Regional Office, as the Manager would in similar circumstances, but the evidence demonstrates that such contact with Regional Office is more a question of informing Regional Office rather than requesting that it deal with the problem. Accordingly, the Board concludes that McMahon exercises managerial responsibilities and she is excluded from the bargaining unit.

12. Barbara Vogel had been an Assistant Branch Manager for approximately fifteen months at the time of the application. The evidence established that the operation in Vogel's branch is essentially the same as in McMahon's branch; that is, the Manager and Vogel together jointly run and manage the branch, both exercise managerial functions, and both are seen by other employees as management. As Vogel explained it, both the Manager and she need approval from Regional Office for the implementation of certain decisions, but the process is more accurately described as one of informing Regional Office, since it usually follows their recommendations, rather than referring the problem to Regional Office for it to handle. Vogel has the authority to discipline employees and has done so in at least one instance. Such disciplinary authority goes beyond verbally warning employees and monitoring their performance. Vogel writes evaluations of the full-time employees, subsequently discusses them with her Manager, and her evaluations are generally followed by the Manager. Following the written evaluations, she, rather than the Manager, generally interviews the employee in question. With respect to the hiring of new employees, the Manager and she together decide who ought to get interviews and who ought to subsequently be hired. Although managerial functions she performs may encompass only twenty percent of her time, the nature of those duties must render her managerial.

13. George Gusman is the Assistant Branch Manager at the seventh branch in question. Most of the interviewing of prospective employees is done by Gusman himself, and he recommends to the Manager and discusses with the Manager who ought to be hired. As the Manager relies on Gusman's interview and recommendation, we conclude that Gusman effectively recommends who ought to be hired. Although Gusman does not feel he disciplines employees, he does discuss problems with them. He completes written evaluations with respect to all employees, and subsequently discusses these evaluations with the Manager, and together they try to reach agreement on the evaluations. When the Manager is away the evaluation may be done entirely by Gusman. These evaluations have direct ramifications for promotions and salary increases. Again, as with the other branches, the Manager is not present at least one day every week and Gusman is the senior person in charge during that day. Although the evidence is not unequivocal, on balance the Board is satisfied that Gusman does step into the shoes of his Manager when his Manager is away on that sixth day, and exercises the managerial functions his Manager would. As Gusman indicated, he has regular interaction with Regional Office, including suggesting to it appropriate discipline. Since Regional Office only has the information and recommendation Gusman gives them, Gusman effectively recommends with respect to disciplinary matters. We are satisfied that Gusman and his manager run this branch on a joint managerial basis and accordingly we conclude that Gusman is not an employee for purposes of the Act and is excluded from the bargaining unit.

14. In summary therefore, Micieli, Murji and Magnifico are included within the bargaining unit, and Fata, McMahon, Vogel, and Gusman are excluded from the bargaining unit. We turn now to considering whether Administration Officer Trainees are included or excluded either from coverage under the Act (on section 1(3)(b) grounds), or from this particular bargaining unit, on community of interest grounds.

15. One trainee was examined, Darjo Carpino, and the parties agreed that his evidence was representative of all the trainees in question. The trainees are involved in a programme which involves rotating through many branches, not only the seven branches subject to this application, staying at a given branch anywhere from two months to twelve months, and learning the duties and responsibilities of all departments within a branch. Regional Office dictates when a particular trainee will rotate to a new branch, and how long he or she will remain in that branch. The immediate supervisor of each trainee in a particular branch is the Manager of that branch, however the trainees report to Regional Office. There is no expectation that the trainees will remain for any lengthy and predetermined period of time at any one branch, and accordingly the trainees do not

attend general branch meetings of all employees. They are not considered by other staff as part of the regular staff within the branch, a reasonable perception given that they do not attend branch staff meetings, but do attend Regional Office seminars.

16. The Board concludes that the trainees do not independently exercise managerial functions within the meaning of section 1(3)(b) of the Act. Trainees are being trained for the Assistant Branch Manager or the Administration Officer position, positions which we have found are managerial in four branches but which are not managerial in the other three branches. Cases referred to by the applicant (*Zeller's Limited*, [1960] OLRB Rep. March. 1283 and *Nashua Canada Limited*, [1979] OLRB Rep. December 921) are of limited assistance when they suggest that where a specific training programme exists, trainees ought to be treated as the Board treats the position for which they are being trained. In the instant case, the Board cannot conclude they are being trained for either an excluded or included position. Rather, they are being trained to perform duties which in some branches are managerial yet which in others are not managerial. On 1(3)(b) grounds we therefore decline to exclude the trainees.

17. However, we have concluded that on community of interest grounds all the trainees ought to be excluded from this bargaining unit (see *Usarco Limited*, [1967] OLRB Rep. Sept. 526 for a consideration of factors relevant to community of interest). The trainees have no definite attachment to any of the branches, as each is engaged on a continuing rotation through several branches. Within each branch, the duration of their stay remains uncertain, and they continue to take overall direction from Regional Office rather than Branch Manager. That they are more closely allied with Regional Office or with their fellow trainees is evidenced by the fact that they do not attend branch meetings, but do attend meetings or seminars conducted by and at Regional Office. The attachment and interest that full-time employees in the bargaining unit would have to their branch or the bargaining unit in question, would have only fleeting meaning for trainees. The trainees will not necessarily end up in any of the seven branches before the Board in this application. Indeed, given that National Trust has 37 branches across Metropolitan Toronto, and 143 branches across Canada, the averages suggest that trainees will not end up in any of the seven branches. As noted, employees in the branches consider trainees as associated with Regional Office, and the employees would clearly perceive the trainees' community of interest as falling with Regional Office. Accordingly, on community of interest grounds the Administration Officer Trainees are excluded from the bargaining unit(s) in this proceeding. Our decision with respect to trainees does not deprive them of collective bargaining, should they have an appetite for it, but stands for the proposition that the Board will not group the trainees into the same bargaining unit(s) as are before us in this application.

18. After hearing the submissions of the parties on the Board Officer's report, as discussed above, the Board entertained the parties' submissions with respect to the jurisdiction of a panel other than the original panel of the Board to consider further matters in this proceeding. The Board ruled unanimously at the hearing that the original panel was not seized with and need not hear any remaining aspects of this matter. We confirm that oral ruling.

19. In the second decision issued in this proceeding, dated August 27, 1986, [1986] OLRB Rep. Aug. 1115, the Board, differently constituted, noted as follows:

13. In the event that this application was to proceed further, the parties agreed to present oral argument with respect to the officer's report on September 15, 1986, to a panel of the Board however constituted, so that the Board could proceed to determine the appropriate exclusions from the branch units, and thus the numerical relevance of the employee statements in opposition. The parties undertook as well to confer as quickly as possible and, with the assistance of a Board officer, finalize the lists of employees applicable to each branch (subject to the Board's

ultimate determination of the exclusions). The Board now confirms all of those arrangements in light of the present decision.

20. In the applicant's submission, notwithstanding the excerpt from the Board's decision set out immediately above, with respect to the question of interim certificates and all other outstanding matters, there was no legal basis for restricting the consideration of those matters to the panel that issued the above decision. Given the extreme difficulty in reconstituting that panel, as one member of it is no longer a Board Member and another member of that panel is out of the country for approximately four months, the applicant asserted that the Board as a discretionary matter ought not to defer further consideration of this application until that panel could be reconstituted. In support of his position, counsel for the applicant referred to *Fuller's Restaurant*, [1980] OLRB Rep. June 828 and *Yesteryear Grocers Inc.*, [1982] OLRB Rep. Dec. 1975, and suggested that there are three questions that the Board must consider in deciding whether a prior panel is seized. First, is there any prejudice to any of the parties in a differently constituted panel considering an issue; second, does fairness demand that the original panel be seized; and as a corollary of the first two points, was there any evidence called on any issue before the prior panel which would not be available to a subsequent, differently constituted, panel. In the instant proceeding, applicant counsel noted that the prior panel had not heard any evidence remaining relevant, as evidence had been given on agreement of the parties directly to the panel and accordingly, there was no bar to a differently constituted panel having carriage of the remaining issues in dispute.

21. In reply, counsel for the respondent noted that the instant panel of the Board was considering this issue only because the respondent had agreed to expedite matters, and more particularly had agreed, as reflected in the excerpt from that decision of August 27, 1986, that the within panel could hear the matter of the Officer's report. The respondent had not agreed that this panel was to deal with any matters other than as specifically remitted to it in the decision referred to above (except for the issue we now discuss, which the respondent agreed could be entertained by this panel). If another panel were to assume carriage of these proceedings, and all outstanding issues, then the agreement entered into by the respondent in order to expedite this matter would be abused. Counsel further asserted that the dominant issue before the original panel was the question of bargaining and the bargaining unit, and a remaining issue, whether interim certificates should issue, similarly involved considerations revolving around bargaining, the very matters before the original panel. Both as a legal matter, whether another panel had jurisdiction to consider the interim certificates, and as a discretionary matter, the respondent submitted that it was inappropriate for any panel other than the original to deal with the issue of interim certificates. In addition to *Yesteryear Grocers Inc.*, *supra*, respondent counsel referred to *Canron*, [1977] OLRB Rep. June 336.

22. In the Board's opinion, the panel which issued the decisions of February 28 and August 27, 1986, is not seized with the remaining issues in this proceeding. There was no suggestion that the prior panel had heard any evidence relevant in any way to the remaining issues, which was not before this panel or which could not be placed before any subsequent, differently constituted panel. All evidence led to date has been written evidence, either by way of an agreed statement of facts and exhibits submitted to the original panel, which remain in the file and available, and which in large part are reflected in the decisions of the original panel, or alternatively by way of the Officer's report which also remains in the file and available to any subsequent panel. The only *viva voce* evidence led in these proceedings concerned the allegation of non-pay or drop off with respect to the solicitation of the membership evidence, as dealt with in the Board's decision of August 27. It is clear that that evidence was and is relevant only to the issue that was finally determined in that Board decision of August 27, 1986. Indeed, no party has suggested that any *viva voce* evidence already given was in any way relevant to any of the remaining issues in this proceeding.

23. It therefore appeared to the Board that there was no prejudice whatsoever to any of the parties should a different panel consider any of the subsequent matters. Any arguments that could have been made to the original panel could equally be made to the freshly constituted panel, and all evidence in these proceedings that remains relevant to any outstanding issue, is in the form of written submissions or evidence and therefore would necessarily be available to any subsequent panel. However, should any of the parties feel that a panel does not have before it evidence relevant to the issue then before that panel, they shall be free to lead such evidence in front of that panel, provided it is relevant and provided they do not attempt to lead evidence relevant only to issues already determined by the Board in any of its prior decisions. Put differently, if the parties feel that evidence has been led by way of *viva voce* evidence that has not been reflected in any of the prior written decisions of the Board, and such evidence remains relevant to an outstanding issue, then they shall be free to lead such evidence. Matters already determined by the Board however, shall not be the subject of further evidence. In light of the Board's view of the jurisdiction of any panel to consider outstanding issues, and in view of the long-standing practice of the Board in certification applications to not saddle a particular panel with carriage of the entire case unless they are legally seized with remaining issues, and in view of the delay that would be occasioned by scheduling the original panel, the Board directs that this matter be relisted before a panel of the Board, however constituted, to deal with all outstanding matters.

24. The composition of any subsequent panel is the prerogative of the Chairman, and we do not propose to comment in that regard. The Registrar is directed to relist this matter to hear all outstanding matters. Although the record suggests that a Board Officer has been appointed to confer with the parties with respect to the lists, for the sake of certainty, we hereby appoint Alex Vigar, Labour Relations Officer, for this purpose and direct that the parties meet with him forthwith to this end. Mr. Vigar is further authorized to disclose the count to the parties, unless all parties agree otherwise.

25. This panel is not seized.

0731-84-R Ontario Public Service Employees Union, Applicant, v. Board of Education for the City of North York, Respondent, v. Ontario Secondary School Teachers' Federation, Intervener

Certification - Membership Evidence - Practice and Procedure - Pre-hearing Vote - Two certification applications consolidated under s.103(3) and pre-hearing vote ordered - Intervener's argument that the date under s.9(4) for determining its actual level of membership support should be its actual intervention/application date and not the deemed application date under s.103 rejected - Intervener's certification application dismissed due to insufficient membership support - New "union/no-union" vote ordered

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and R. M. Sloan.

APPEARANCES: Ian Roland, and Ivor Oram for the applicant; Steven L. Moate and Barbara J. Fickert for the respondent; Maurice A. Green and Fred Birket for the intervener.

DECISION OF THE BOARD; January 22, 1987, as amended February 13, 1987

1. This is an application for certification in which the applicant ("OPSEU") and the intervenor ("OSSTF") both requested that a pre-hearing vote be taken. The relevant provision of the *Labour Relations Act* is section 9 which reads as follows:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

2. The OPSEU application was made on June 13, 1984, and the Board fixed a terminal date of June 22, 1984. On June 22, OSSTF made its application. In those circumstances, section 103(3) of the Act gives the Board three options:

(a) to treat the subsequent application as having been made on the date of the original application;

(b) postpone consideration of the subsequent application until a final decision has been issued on the original application; or

(c) refuse to entertain the subsequent application altogether.

In a decision dated July 6, 1984, [1984] OLRB Rep. July 989, the Board (differently constituted) embraced option (a) and decided to treat the OSSTF application as having been made on June 13, 1984, the date the OPSEU application was filed. The two applications were consolidated and processed on that basis.

3. The purpose of the pre-hearing vote procedure is to test the question of representation as quickly as possible after the application date. This avoids the prejudice which can often arise when the conduct of a representation vote must await the determination of issues which can only be resolved after a hearing in which all of the affected parties can participate. Under section 9(2) the Board strikes a voting constituency and determines whether the applicant has the requisite *appearance* of membership support within that voting constituency. Any contested issues are dealt with later, after the vote has been held. However, section 9(4) makes it clear that the results of a pre-hearing vote will have no effect unless it is later demonstrated that, in fact, not less than thirty-five per cent of the persons ultimately found to have been employees in the appropriate bargaining unit, on the application date, were members of the applicant on that date.

4. Upon an examination of the records of the applicant, the respondent, and the intervenor, it appeared to the other panel of the Board that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant and/or the intervenor at the time the application was made; namely June 13, 1984. It is abundantly clear (and not

disputed before us) that the date the Board used for this preliminary assessment of support under section 9(2), was June 13, 1984 - the actual application date for the OPSEU application and the "deemed" application date for the OSSTF application. In both cases the Board treated June 13, 1984, as the "time the application was made" (to repeat the words of section 9(2)) and directed a representation vote on the basis of the "appearance" of support demonstrated on that date.

5. OSSTF now urges the Board to adopt a different date under section 9(4) for determining its *actual* level of membership support. In OSSTF's submission the "time the application was made" for the purposes of section 9(4) should be June 22, 1984, the actual intervention/application date rather than June 13, 1984, the "deemed" application date under section 103. Its reason for taking this position is quite simple and candidly conceded. Approximately half of its membership cards were signed after the OPSEU application was filed. If the relevant date under section 9(4) remains June 13, 1984, OSSTF will not be able to demonstrate sufficient support, in fact, to even warrant its appearance on the ballot. Its certification application would have to be dismissed. That is why OSSTF urges the Board to assess its position as at June 22, by which time it had mobilised a sufficient level of membership support to warrant its continued participation in these proceedings. That would mean, of course that the two applications would be assigned different membership assessment dates under section 9(4), and further that the Board would be assigning a different meaning to the phrase "at the time the application was made" which appears in both section 9(2) and section 9(4). In effect, OSSTF is arguing that for the purposes of the 9(4) determination we should reconsider the earlier panel's decision to entertain the intervener's application but deem it to have been made on the date of the making of the original application.

6. We decline to do so. In our view, a reading of section 103(3) confirms its remedial thrust. It gives a tardy applicant something that it would not otherwise have: a right to participate, *as an applicant*, in another union's certification proceeding rather than having to wait until the earlier application has been disposed of. But the right of a latecomer to participate may carry with it certain disabilities - namely that its application will be treated as having been made on the date of the making of the original application. That is what happened here, and it is evident that the first Board panel used June 13, 1984, as the date for assessing the unions' appearances support, and directed a vote on that basis. We do not think that it would be consistent with the earlier Board decision or the interpretation of section 9(4) if the phrase "the time the application was made" were now given a different meaning. If this creates something of an anomaly or leads to a result based upon a fiction, it is only because of the way in which section 103 recognizes but also limits the rights of latecomers who file "intervener" applications for certification.

7. For the foregoing reasons we are satisfied that the date for assessing the unions' level of membership support under section 9(4) of the Act, is June 13, 1984, the actual application date for OPSEU and the deemed application date for OSSTF. On that basis, the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of OPSEU at the time the application was made; however, the Board is *not* satisfied that thirty-five per cent of the employees of the respondent in the bargaining unit were members of OSSTF at the time the application was made. OSSTF did not, in fact, have the requisite level of membership support to warrant its appearance on the ballot. Its certification application is therefore dismissed.

8. What is the result of this finding? The parties are agreed that there must now be a new "two-way" vote in which the respondent's employees will be asked to choose between representation by OPSEU or a "no union" option. The voting constituency continues to be the one the parties were agreed upon. It is set out more specifically at paragraph 4 of the Board's decision of July 6, 1984:

All occasional teachers employed by the respondent in its secondary school panel in the City of North York, save and except persons covered by subsisting collective agreements.

Clarity Note: For the purpose of clarity, the term "occasional teacher" means a teacher employed as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that it does not extend beyond the end of a school year, and does not include any teacher who is employed under a contract of employment in the form prescribed by the regulations under the *Education Act*.

9. All employees of the respondent in the voting constituency on January 12, 1987, who have not voluntarily terminated their employment or who have not been discharged for cause between January 12, 1987, and the date the vote is taken will be eligible to cast ballots.

10. Voters will be asked to indicate whether or not they wish to be represented by the applicant, OPSEU, in their employment relations with the respondent.

11. Counsel for the respondent and OPSEU have advised the Board that it will be necessary for these parties to meet in order to try to settle new voters lists and a voting procedure which will appropriately recognize the characteristics of the voting constituency. To this end, a Labour Relations Officer is hereby appointed to meet with the parties and assist in making voting arrangements; however, we wish to make it clear, as we did at the hearing, that because of difficulties encountered in previous cases where this method was used, we are not inclined to favour a process of mailed ballots. We are however receptive to designing a balloting process which meets the needs of the employees in the voting constituency. We will remain seized of this aspect of the case, and should it be necessary to address the Board further, the parties may do so, in writing.

0471-85-R Ontario Public School Teachers' Federation, Applicant, v. The Board of Education for the City of Scarborough, Respondent

Bargaining Unit - Certification - Appropriate bargaining unit consisting of all occasional teachers on the elementary school panel - Secondary occasionals who filled in for primary school teachers during professional conference not considered employees for the purpose of the count

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *F. W. Murray* and *D. Patterson*.

APPEARANCES: *C. M. Mitchell* and *D. Lennox* for the applicant; *John W. Woon*, *C. R. Mason* and *R. A. Mitchell* for the respondent.

DECISION OF THE BOARD; January 27, 1987

I

1. This is one of a number of certification applications in which various teacher organizations seek to represent "occasional teachers" employed by Ontario Boards of Education. Occasional teachers fill in on an "as needed" basis for regular classroom teachers who are absent for one reason or another. It is not disputed that these casual employees are excluded from *The School*

Boards and Teachers Collective Negotiations Act, 1975 ("Bill 100"), and therefore, by default, fall within the ambit of the *Labour Relations Act*.

2. In this case the applicant has requested, and the Board has directed the taking of a pre-hearing representation vote. Pursuant to section 9(2) of the Act, the Board (differently constituted) directed that a representation vote be taken in the following *voting constituency*:

All occasional teachers employed by the respondent in its elementary panel, in the City of Scarborough, save and except employees in the bargaining units for which any trade union held bargaining rights on May 27, 1985.

The applicant asserts that this is also the description of the *appropriate bargaining unit* to be determined by the Board under section 9(4). The respondent disagrees. The ballot box has been sealed pending a resolution of this outstanding dispute concerning the *description* and *composition* of the unit of employees appropriate for collective bargaining.

3. The respondent claims that the voting constituency set out above does not constitute an "appropriate bargaining unit". The respondent argues that the Board should describe the bargaining unit this way:

All teachers employed as occasional teachers by the respondent, in the City of Scarborough, save and except persons covered by subsisting collective agreements.

The respondent's position is that the bargaining unit should encompass *all* occasional teachers appearing on both the primary school and secondary school panels. Counsel contends that a composite unit is appropriate in this case because the two groups of employees share a community of interest and the more broadly based bargaining unit reduces the degree of fragmentation of the respondent's work force.

4. Although there is no precedent for the bargaining unit description that the respondent urges upon us, the argument itself is not novel. A similar argument was considered, at some length, in the first occasional teacher application to come before the Board: *The Board of Education for the City of Toronto* [1983] OLRB Reports Feb. 273. There, the request for a unit encompassing all occasionals was made by the applicant, the Ontario Public Service Employees Union. In rejecting that proposition the Board commented, in part, as follows:

While similar considerations [concerns about fragmentation] provide considerable support for the applicant's contention that there should be a single bargaining unit for all of the respondent's occasional teachers, we are of the view that other relevant factors are present which make separate elementary and secondary panel bargaining units appropriate in the circumstances of this case. The historical dichotomy between elementary school teachers and secondary school teachers is reflected in the special legislation which governs collective negotiations between boards of education and "contract" teachers (i.e., the *School Boards and Teachers Collective Negotiations Act*). Their separate communities of interest also find expression in their distinct bargaining priorities, as reflected in the somewhat diverse provisions contained in the collective agreements between the respondents and the respective branch affiliates who represent the respondent's elementary and secondary panel (contract) teachers. The provisions of those agreements mirror some of the distinctions between secondary schools, with their emphasis upon departmentalized, subject orientation with the concomitant emphasis upon positions of responsibility within the various departments, and elementary schools with their disparate emphases as described by counsel for the respondent (and set forth earlier in this decision). Defining separate bargaining units for the respondent's elementary and secondary panel occasional teachers is

consistent with the Board's practice of describing bargaining units of part-time employees (who are somewhat analogous to the employees affected by this application) in a fashion which mirrors the description of their full-time counterparts. Although some of the respondent's occasional teachers are qualified to teach not only some grades at the elementary school level, but also some grades at the secondary school level, it appears that the actual interchange of occasional teachers between the two panels is quite limited, and could, in any event, be accommodated by appropriate collective agreement language within the context of separate bargaining units. Moreover, the fact that the overwhelming majority of the respondent's occasional teachers are qualified to teach in only one of the two panels underlines the fact that the qualifications required for teaching various subjects at the secondary school level differ from those required for teaching at the elementary school level (see regulations 262 and 269 (as amended) made under the *Education Act*).

5. This approach has been followed in all subsequent occasional teacher cases, so that there is now a well established bargaining unit pattern. There is no evidence whatsoever of any concrete collective bargaining problems arising from those Board determinations. So far as one can tell, bargaining units which "mirror" their Bill 100 counterparts appear to work, even though the Board, in other contexts would not define a bargaining unit in that way. Indeed, the Board was even prepared to define an occasional teacher bargaining unit in terms of the language of instruction - recognizing that English/French divisions had become part of the historical pattern of teacher collective bargaining which was recognized and given statutory force in Bill 100. The fact is, that we have only a minor and residual role in the education sector, and there are sound policy and collective bargaining reasons for "mirroring" the institutional arrangements which teacher organizations and Boards of Education have developed over the years and which the Legislature clearly endorsed in Bill 100. Finally, as the Board pointed out in *Hospital for Sick Children* [1985] OLRB Rep. Feb. 266, the question of the bargaining unit definition really involves a relatively simple question: "Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer". (See also *National Trust* [1986] OLRB Rep. Feb. 250). From that perspective, we have no doubt whatsoever that the occasional teachers on the elementary school panel (as described more particularly in paragraph 2 above) constitute an appropriate bargaining unit. We so find.

II - Bargaining Unit Composition

6. A related and more difficult question concerns the *composition* of the bargaining unit and, in particular, the identification of those occasional teachers - necessarily employed on an intermittent basis - who should be treated as part of the bargaining unit for certification purposes. This is not an easy task, yet it obviously has a significant impact on the teachers' ability to organize themselves and establish a collective bargaining relationship. The broader the constituency of casual workers whose views must be canvassed, the more difficult it will be to organize or demonstrate the requisite degree of membership support. The applicant asks, rhetorically: how can one organize teachers who are seldom there and whose employment and work opportunities are transitory, sporadic, and unpredictable? Why should occasionals who seldom teach at all, or who have not taught recently govern the outcome? The practical effect of an unduly broad definition is that the disinterest of teachers whom the union may not even be able to locate or identify, or who may not have worked recently, could frustrate the establishment of collective bargaining for those occasional teachers who have expressed an appetite for it. That was a dilemma which the Board considered in *Board of Education for the City of York* [1985] OLRB Rep. May 767; however, before considering that decision and its application in the instant case, it may be helpful to briefly sketch in the general statutory framework within which we must make our decision.

III - General Considerations

7. Section 9 of the Act requires the Board to ascertain the number of *employees in the bargaining unit at the time the application is made*; but there are no legislated criteria to guide the Board in this task. The determination as to whether a person is, or is not to be treated as an employee in the bargaining unit on the application date, is left to the Board to decide and, of course, there is really no difficulty in respect of those individuals who are *actually working* on the application date. The problem arises in the case of persons who might have some claim to employment status *for certification or collective bargaining purposes* (whether or not they would be “employees” at common law), but who were not actively at work on the application date, and may not even be scheduled to return to work for some time thereafter. Persons on sick leave, maternity leave, long term disability, workers compensation, or lay-off may fall into this category. So would casual workers employed on an irregular, contingent, or “as needed” basis by a firm whose employee needs fluctuate from day to day.

8. To cope with these practical problems, the Board has, over the years, developed a number of “rules” or “standardized approaches” concerning the way in which it should go about its task of ascertaining the number of employees *in the bargaining unit* on the application date. For example, to distinguish between full-time and part-time employees (typically grouped in separate bargaining units) the Board usually looks to the individual’s work record in the seven weeks immediately preceding the application date in order to determine an individual’s status. (See *Trenton Memorial Hospital* [1980] OLRB Rep. Jan. 117). Similarly, in the construction industry, where employment is often transitory, so that workers are “here today and gone tomorrow”, the Board has determined that the employee complement, for certification purposes, should consist only of those individuals actually working on the application date - fully realizing that this number may well be different the day before, or the day after. (See the discussion in *Smiths Construction Company* [1984] OLRB Rep. March 521). In most non-construction situations, the Board has been disposed to apply what has now come to be known, colloquially, as its “thirty/thirty - day rule”. In order to meet the requirements of the thirty/thirty - day rule, an employee not actually at work on the application date must have worked at some time in the thirty day period immediately preceding the application date *and* work, or be expected to return to work at some time in the thirty day period immediately after the application date. The employees in the unit for certification purposes are those actually employed around the time the application is made. (See *Board of Education for the City of York supra*; *Board of Education for the City of Toronto supra*, and cases referred to therein, and more recently, *Toronto General Hospital*, [1986] OLRB Rep. Dec. 1855.

9. The Board recognizes, of course, that these are procedural constructs, but they are not, for that reason artificial. They have evolved from, and are based on, the Board’s experience, over the years, in thousands of certification applications. They have been applied for many years, have wide acceptance in the labour relations community, and, without them or some similar “rules”, the Board would be unable to process the hundreds and hundreds of certification applications which are disposed of each year. It would be drowned in a sea of litigation as parties “jockey with the list” in each case, - a result quite inconsistent with the Preamble to the Act, and the reality that “labour relations delayed are labour relations defeated and denied” (to borrow the phrase of Estey J.A., as he then was, in *Jounal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild et.al.* - unreported, March 31, 1977, Ontario Court of Appeal). [See also the remarks of Lasken J.A. in *R. v. OLRB, ex parte Nick Masney Hotels Ltd.* [1970] 3 O.R. 461] These “rules” are not “writ in stone” but they provide an important element of certainty and predictability.

10. The *York* case also dealt with “occasional teachers” but declined to apply the “thirty/thirty rule” - thereby departing from the decision of an earlier panel of the Board in some-

what similar circumstances (see *Board of Education for the City of Toronto* cited *supra*). In *York* the Board had before it what was acknowledged to be an anomaly: a bargaining unit which would necessarily consist solely of casual workers with only a tenuous attachment to the workplace and an equivocal claim to continuing employee status. That is a unit which, under ordinary circumstances, the Board would never consider to be appropriate and which arose only because this group of teachers was excluded from the collective bargaining legislation governing their professional peers. In *York* (as here) there was not just a fluctuating and often unpredictable complement of casual employees. There was no “core group” of regular employees either, and the occasional teachers could not even readily associate for collective bargaining purposes with the contract teachers they replaced, because these permanent teachers were covered by Bill 100. In this very special context the Board was moved (with some reluctance given the earlier *City of Toronto* decision) to depart from its usual approach based upon the thirty-thirty rule. The Board eventually decided that, for an occasional teacher bargaining unit, the employee list, for the purposes of “the count”, should include all occasional teachers on the (secondary) panel maintained by the employer, who remained actively interested in the casual employment opportunities which might arise from time to time, and whose interest was confirmed by having worked, at least once, in the one year period preceding the application date.

11. Obviously, no approach adopted by the Board could ever achieve perfect decimal point democracy, or command the unqualified acceptance of partisans in particular cases; for, as we have already mentioned, the broader the bargaining unit constituency, the more difficult it will be to organize (particularly where the union has no right to know, in advance, who the employees are, and no protected right to organize on the employer’s premises.) Any proposition which expands the scope of the bargaining unit beyond those employees actually at work on or around the application date, or renders the composition of the bargaining unit uncertain, will necessarily raise a barrier to the employees’ right of self-organization. Conversely, the more narrow and certain the employee constituency, the easier it will be for them to identify their collective interests and establish a majority for collective bargaining purposes. The “*York Rule*” was a *compromise* of these competing considerations - bearing in mind, we repeat, that the teachers appearing on the casual call-in list were probably only “employees” in the common law sense when *actually* employed, and that those who only worked sporadically did not have a very strong claim for consideration in a certification application.

12. The particular problem raised in the instant case is not the *York* test, *per se*, - although counsel for the union was sharply critical of the impact of that test on the union’s ability to organize individuals who may not have been at work for months. He noted that, in contrast to the thirty/thirty rule, the *York* test was not very precise and did not, in practice, provide a “bright line test”. He pointed out that, given the one year time frame, there was a real likelihood that there would be a number of individuals who had worked in the previous year and whose names appeared on the employer’s list, who were no longer interested in casual employment, because they had moved, or had secured permanent jobs elsewhere but had not advised the employer of their change of status. That is especially so, he said, in Metropolitan Toronto where an occasional teacher may be registered with several Boards in an effort to improve his/her chances of a *permanent* teaching appointment (which also raises the oddity that, under the *York* test, it is arguable that an occasional teacher could be regarded as working for two employers in two different bargaining units *at precisely the same time* even though he was not actually working for either at the time the application is made).

13. However, the real focus of the union’s argument concerned what was described as a distortion or exception which should be taken into account even if the Board were disposed to stick with the *York* approach. Apparently, in the period immediately preceding the application for certi-

fication, there was a “professional development” conference involving primary school teachers. Quite a number of the respondent’s staff wished to attend, which created an unusual peak demand for occasionals to “fill in” over two half days. That demand could not be met (or the respondent did not choose to meet it) solely from those occasional teachers appearing on the elementary school panel. Instead, the respondent chose to call upon the services of occasional teachers appearing on (and qualified for) the secondary panel.

14. The employer asserts that all of these “secondary occasionals” should be treated as “employees” in the applicant’s proposed bargaining unit. The practical result, of course, is a significant enlargement of the “employee” constituency, within which the union must demonstrate the requisite level of membership support; moreover, that “bubble effect” would continue for some time into the future, even though this large “cross-over” from the secondary to the primary panel is admittedly a highly unusual event unlikely to be repeated very often. The union points out that the respondent itself requires that teachers to signify whether they wish to be on the primary or secondary panel and argues that it would be both absurd and grossly unfair if the collective bargaining rights of the primary occasionals depended upon the union’s ability to solicit the membership support of individuals with such a tenuous attachment to the proposed bargaining unit - particularly since, following the pattern of Bill 100, the secondary occasionals are typically represented for collective bargaining purposes by the Ontario Secondary School Teachers Federation. The union asserts that the respondent’s position is simply an effort to defeat the certification application by inflating the list with the names of persons whom it knows have no real attachment to the primary occasional bargaining unit, and for that and institutional reasons, no real interest in representation by the applicant. (Primary and secondary school teachers have historically been represented by different organizations, which under Bill 100 became their designated bargaining agents). It is, according to counsel, a form of “gerrymandering” which the Board should not accept.

15. Without commenting on the respondent’s motive in this matter, we are inclined to agree with the position advanced by the applicant union. As we have already noted, the *York* rule was a compromise based on competing considerations in a novel situation. It stretched the meaning of “employment in the bargaining unit at the time the application was made” well beyond anything the Board had ever considered before, and probably beyond any test of current employment which a Court would apply. Be that as it may, we believe that it is incumbent upon the Board to give an interpretation to the Act (here section 9) consistent with practical collective bargaining realities and while that may require a degree of flexibility and innovation we do not think that we should lightly embrace an interpretation which yields an anomalous collective bargaining result or raises unwarranted barriers to the certification process. We find that those individuals ordinarily appearing on the secondary panel and available for work in the secondary schools are “not employees in the bargaining unit at the time the application was made” even though, in accordance with the *York* test, they may have occasionally worked in the primary schools in the year preceding the application date. Indeed, we would go further. We find that persons whose names are recorded on the secondary panel list, but not *also* recorded on the primary panel list should not be included in the bargaining unit, on a community of interest basis, even if they have occasionally moved from their usual employment sphere to work in the respondent’s primary schools. That is the natural implication of bargaining unit descriptions framed with reference to the “primary” or “secondary” panel and it is reinforced not only by the Board’s now well established practice, but also by the respondent’s own conduct in requiring teachers to indicate on which panel they wish to appear. In summary, we find that teachers on the secondary panel, or part of the “bubble” are not employees in the bargaining unit at the time the application was made for the purposes of “a membership count”, nor were they eligible to cast ballots in the representation vote directed to ascertain whether the primary occasionals wished to be represented by the applicant.

IV

16. A final question may still have to be determined, but we are not certain that it is necessary, or that we are able to do so on the basis of the material currently before us. This question concerns whether the respondent can alter (the respondent says “rectify”) the employee list after a meeting with a Labour Relations Officer in which the list and the union’s membership evidence were reviewed, and the officer expressed the opinion that, in his view, the union had established the requisite “appearance” of support to warrant a Board direction that a representation vote should be taken. It appears that the original list may have contained what the respondent regards as mechanical errors, arising from the sporadic nature of the occasionals’ employment, the inadequacy of its own records, and the difficulty of applying the *York* test to this contingent of casual workers. That submission is underlined, and perhaps supported, by the fact that certain other modifications to the list had to be made as a result of union challenges which, upon investigation, turned out to be valid. The applicant contends that the employer cannot add to the employee list after the “membership count” (or, more accurately “appearance of support”) has been revealed, even if there was a *bona fide* error.

17. It appears to the Board that this issue can, at most, effect a very small number of individuals and, that, having regard to the other Board determinations set out above, their inclusion on or exclusion from the list may not effect the ultimate result. For example, to the extent that the names “discovered” are on the secondary panel, they would not be included in the bargaining unit in any event for the reasons set out above. Unfortunately, the principle focus of the argument was the description of the bargaining unit and the inclusion or exclusion of those teachers nominally on the secondary panel. The parties did not clearly identify the names or number of those individuals alleged by the respondent to be properly in the unit, but omitted from the list allegedly by mistake, and a hearing where that might have been explored, was cancelled.

18. Accordingly, it is appropriate in our view to appoint Alex Vigar, a Labour Relations Officer, to meet with the parties, once again, to review the lists and the union’s membership evidence in light of the determinations made in this decision. It may be that our disposition of the bargaining unit description and the issue of the secondary occasionals will, in fact, be dispositive. However, if there are any outstanding issues to be addressed, prior to the final disposition of this application pursuant to section 9(4), the parties may do so either in writing or at a hearing if they so request.

1476-85-OH; 1515-85-U Bonita Clark, Complainant, v. **Steel Company of Canada, Inc.**, Respondent, v. The Toronto Star, The Hamilton Spectator and The Globe & Mail, Interveners; Bonita Clark and Local 1005, United Steelworkers of America, Complainants, v. Steel Company of Canada Inc., Respondent, v. The Toronto Star, The Hamilton Spectator and The Globe & Mail, Interveners

Health and Safety - Practice and Procedure - Unfair Labour Practice - Complainant's advisor refused admittance to respondent's property for the purpose of a view - Board having authority to order view and determine who should attend - Whether press should be excluded from hearing room or prohibited from publishing any evidence until the end of the case

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *D. A. MacDonald* and *B. L. Armstrong*.

APPEARANCES: *Mary Cornish*, *Nelson Roland*, *Laura Trachuk*, *Bonita Clark* and *Stan Gray* for the complainant Bonita Clark; *Brian Shell* and *Brian Greenaway* for United Steelworkers of America, Local 1005; *Janice Baker* and *Terry Thorpe* for the respondent; *Stuart M. Robertson* for the interveners The Toronto Star and The Hamilton Spectator; *Peter Jacobsen* for the intervener The Globe & Mail.

DECISION OF THE BOARD; January 6, 1987

1. File No. 1476-85-OH is a complaint under section 24 of the *Occupational Health and Safety Act* ("the OHSA") in which the complainant, Bonita Clark, alleges that the respondent, the Steel Company of Canada Inc. ("Stelco") has contravened the OHSA. File No. 1515-85-U is a complaint under section 89 of the *Labour Relations Act* in which both Clark and the United Steelworkers of America, Local 1005 ("the union") allege that Stelco has contravened sections 3, 64, 66 and 70 of the Act.
2. These matters are hereby consolidated.
3. *The Toronto Star*, *The Hamilton Spectator* and *The Globe & Mail* are hereby added as interveners hereto for the purpose of this decision.
4. This decision sets out in writing two oral rulings made by the Board on this matter with respect to the individuals permitted to take a view of Stelco and the presence of the press in the hearing room.
5. The hearing into these matters began on December 4, 1986; certain other preliminary matters were dealt with at that time. In addition, the parties agreed that it would be useful if the Board and the parties took a view of Stelco's Hilton Works in Hamilton. Arrangements were subsequently made to take the view on the morning of December 15, 1986.
6. In a letter dated December 12, 1986, counsel for Stelco indicated that the following persons would be able to attend the view: the members of the panel hearing the case, the complainant and her counsel and an official of and counsel for the union. Counsel for Ms. Clark then requested that the Board make an order permitting Nelson Roland, her associate and Laura Trachuk, her articling student and Stan Gray, her adviser, to attend on the view.
7. On the morning of December 15, 1986, counsel for Stelco indicated that Stelco would not dispute the presence of Mr. Roland and Ms. Trachuk on the view but would not allow Mr.

Gray access. We then heard submissions from counsel for all parties on whether the Board could and should order that Mr. Gray could attend the view. Counsel for Stelco took the position that the Board had no authority to make such a ruling; she indicted also that Mr. Gray was not welcome at Stelco but did not explain why. Counsel for Ms. Clark stated that she required the assistance of Mr. Gray on the view since she was not familiar with the technical aspects of the Stelco operation. After recessing to consider counsel's submissions, we gave the following oral ruling:

1. Mr. Gray is to be allowed to attend on the view of Stelco.
2. Under section 102(13) of the Act, the Board is required to "give full opportunity to the parties to any proceedings to present their evidence and to make their submissions". Administrative law requires the Board to provide a fair hearing in accordance with the principles of natural justice.
3. Section 103(2)(e) of the Act permits the Board "to enter any premises where work is being or has been done by the employees or in which the employer carries on business ... and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any matter...." Section 103(2)(e) of the Act is incorporated by reference as part of the OHSA through section 24(4) of the OHSA.
4. The above general principles and specific statutory provisions give the Board the authority to order a view and to determine whom the interests of fairness indicate should be allowed to attend on the view. The view is a continuation of the hearing, held more informally in the plant rather than in the hearing room.
5. The next issue is whether the Board should exercise its jurisdiction in this instance to order that Mr. Gray be permitted to attend on the view. Mr. Gray has been an adviser to counsel for the complainant throughout this matter. She has stated that Ms. Clark would be prejudiced if he is not available to assist her on the view. The employer has not shown that any prejudice would accrue to it if Mr. Gray attends. Accordingly, we order that Mr. Gray be permitted to attend on the view.
6. We note that attendance on the view is subject to an implied undertaking that any information obtained during the course of the view is to be used only for the purpose of this litigation and for no other purpose. That undertaking applies to everyone involved in the view and any breach of that undertaking would be treated very seriously by the Board.

8. After we gave our ruling, counsel for Stelco informed the Board that Stelco would not comply with our order. We then heard submissions on the method of enforcing the order. However, after a recess requested by counsel for Stelco and before we made a ruling on the method of enforcement, counsel for Stelco informed the Board that Stelco would comply with our order. The Board and the parties then took the view.

9. At the outset of the following day's hearing, counsel for Stelco requested that the press be excluded from the hearing room or, alternatively, that they be prohibited from publishing any evidence until the end of the case. There was a recess to permit members of the press present in the hearing room to contact counsel representing their newspapers. Counsel for *The Toronto Star* and *The Hamilton Spectator* and counsel for the *Globe and Mail* attended and made submissions to

the Board. After hearing submissions from all parties, we recessed and then issued the following oral ruling:

1. We are satisfied that the Board cannot exclude the press from the hearing room. We are unable at this stage in the proceedings to determine whether any particular matter falls within section 9(1)(b) of the *Statutory Powers Procedure Act* (SPPA) and make no ruling at this time in regard to exclusions of the press when specific evidence is being given.
2. If any party believes that a matter falls within section 9(1)(b) of the SPPA, that party will bear the onus of satisfying the Board that section 9(1)(b) applies. We note that section 9(1)(b) is an exception to the presumption that hearings of this tribunal be open to the public. That openness is achieved in large part through the vehicle of the press. Thus section 9(1)(b) is to be construed narrowly. As a general matter we are of the view that these allegations do not fall within the exceptional interests set out in section 9(1)(b). We note, too, that the only alternative open to the Board should it be satisfied that section 9(1)(b) applies, is to hold that portion of the hearing *in camera*. There is no middle ground which would permit the Board to prohibit the publication of specific evidence, while permitting the press to attend at the hearing.
3. We note that the parties are agreed that it may not be necessary to reveal the names of all persons to whom reference has been made in the complaints, although there has been no agreement with respect to which specific individuals shall not be referred to by name.

10. This case is to continue on March 30, April 7, 9, 16 and June 23 and 24, 1987 on agreement of the parties before this panel of the Board. The parties estimate they will require ten days of hearing in addition to the dates listed. This matter is referred to the Registrar to list at least ten additional days of hearing.

2745-85-R; 2855-85-R; 2856-85-R; 2854-85-U Lumber and Sawmill Workers' Union Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Applicant v. **Sylvor Limitee**, Synco Timber Limited, Respondents; Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Complainant v. Synco Timber Limited, Sylvor Limitee, Mr. Roger Paquin, Respondents

Bargaining Unit - Certification Where Act Contravened - Unfair Labour Practice - Geographic scope of bargaining units in lumber industry - Comments in letter from employer to employees contravening ss.64 and 70 - Employees still able to freely express choice in representation vote - Vote ordered

BEFORE: Ken Petryshen, Vice-Chairman, and Board Members J. A. Ronson and L. C. Collins.

DECISION OF THE BOARD; January 21, 1987

1. The Board has before it an application for certification along with a section 89 complaint. The section 89 complaint against the respondent companies and Roger Paquin is essentially being relied upon by Local 2995 in support of its position that it is entitled to certification without a vote pursuant to section 8 of the Act.

2. The matters referred to above, as well as section 1(4) and section 63 applications were entertained by the present panel of the Board at a hearing in Timmins in June, 1986. At that time, after entertaining the evidence and the parties' submissions in regard to the section 1(4) matter, the Board ruled orally at the hearing that Sylvor Limitee ("Sylvor") and Synco Timber Limited ("Synco") are related employers within the meaning of section 1(4) of the *Labour Relations Act* and declared that these two corporations are one employer for the purposes of the Act. Our reasons for this ruling are set out in a decision of the Board dated November 28, 1986.

3. At the June hearing, the parties advised the Board of their respective positions with respect to the appropriate bargaining unit description. The applicant proposed the following bargaining unit description:

All employees of the respondents engaged in their woodcutting operations in the Districts of Algoma and Cochrane, save and except foremen, those above the rank of foreman, office, sales, garage employees and mechanics.

The respondents were not prepared to agree with the proposed description. The respondents argued that there should be two bargaining units, one unit consisting of all employees of Sylvor Limitee engaged in conventional woodcutting and a second unit consisting of all employees of Synco Timber Limited engaged in woodcutting operations, with both units having the same exclusions as those proposed by the applicant. In addition, the respondents argued that the geographic scope set out in the applicant's proposed unit was inappropriate. The Board entertained the parties' representations relating to the geographic scope of the bargaining unit and reserved its decision. With respect to the issue of whether one or two bargaining units were appropriate, the parties agreed that the Board should consider the evidence before it relating to the section 1(4) issue. The union advised the Board that, in addition to the section 1(4) evidence, it wished to call some further evidence to support its position that there should be only one bargaining unit. The Board advised the parties that it would hear the union's evidence in this regard when it reconvened at some future date to deal with the remaining issues in dispute between the parties.

4. The hearing resumed in early December 1986. At the outset of the hearing, the Board advised the parties of its decision with respect to the geographic scope of the bargaining unit. The Board ruled that it would not give a geographic scope as proposed in the applicant's bargaining unit description. The Board indicated to the parties that it would give them another opportunity to agree on the geographic scope of the unit now that they were aware of the Board's ruling. The reasons for our ruling on the geographic scope issue are set out below.

5. Counsel for the applicant argued that the Board should depart from its usual practice when it determines the geographic scope of bargaining units in the lumber industry, given the particular circumstances in this case. Counsel emphasized that these respondents did not operate a lumber mill and that their activities are limited to cutting operations. Therefore, the respondents could move their employees to any location where they were able to obtain contracts to cut wood. It was counsel's contention that the Board's practice has developed in the context of cases where employers had a mill operation and clearly defined timber rights. Counsel advised the Board that after certification, it was the invariable practice of his client to negotiate a recognition clause which

covered an employer at all of its work sites and that this was another reason why the Board should not follow its usual practice in this case.

6. In determining the geographic scope of bargaining units, the Board balances the interests of persons to join a trade union of his or her choice with the objective of providing sufficient stability to a bargaining relationship. In defining the geographic scope of bargaining units in the lumber industry, the Board's practice is to certify an employer for an area covering the township or townships in which the employer is operating as of the date of the application, and the townships immediately adjacent thereto. The Board also issues certificates covering an area specified by Crown licences or permits. See *Howard Bienvenue Inc.*, [1966] OLRB Rep. June 188. After reviewing all of the circumstances in this case, we were not satisfied that this was an appropriate case for the Board to depart from its usual practice. The Board hereby confirms its oral ruling to this effect.

7. At the hearing on December 2, 1986, counsel for the union advised the Board that he would not be calling further evidence directed to the issue of whether there should be one or two bargaining units. The Board, then, entertained the parties' submissions on that issue. After reviewing the evidence before us and after considering the parties' submissions, the majority of the Board, Board Member J. A. Ronson dissenting, ruled orally at the hearing that the employees of Sylvor and Synco will be in one bargaining unit. The majority's reasons for such a finding are set out below.

8. The facts relevant to our determination of this issue are set out in the Board's decision dated November 28, 1986. A review of the evidence indicates that employees of both corporate respondents are engaged in logging operations. The employees of Sylvor essentially perform conventional logging and a number of employees of Synco also essentially perform conventional logging. Although the majority of Synco's production emanates from its unconventional logging operation, Sylvor and Synco are integrated to a considerable degree. Some of Synco's equipment, employees and managerial personnel are utilized by Paquin to provide support services to the conventional logging operation. Although the terms of employment differ to some extent between some of the employees of Synco compared to the employees of Sylvor, the two groups of employees do share a community of interest. Placing the two groups in separate bargaining units would cause undue fragmentation. The majority of the Board hereby confirms its oral ruling.

9. Prior to the conclusion of the hearing, the parties advised the Board that they were able to reach agreement on the geographic scope of the bargaining unit in the face of the Board's ruling relating to the geographic scope. Having regard to the partial agreement of the parties and the Board's rulings with respect to the bargaining unit, the Board finds that all employees of the respondents in their woods operations in the Townships of Byng, Ericson, Puskuta, Barker, Nassau, Fushimi, Kipling, Dowsley, Langemarck, McCowan, Neely, Owens, Williamson and Idington, Opasatika, Eilber and Devitt, and Fleck and those Townships immediately adjacent thereto, save and except foremen, those above the rank of foreman, office, sales, garage employees and mechanics, constitute a unit of employees of the respondents appropriate for collective bargaining.

10. The Board disclosed to the parties the applicant's membership support at the relevant period of time and advised the parties that the applicant was in a vote position. The Board, then, entertained evidence relating to the union's claim that the Board should certify it without a vote pursuant to section 8 of the Act. After entertaining the evidence and submissions of the parties pertaining to the section 8 issue, and after recessing to consider the matter, the Board orally ruled at the hearing on December 3, 1986, as follows:

- (1) that it found the employer did contravene sections 64 and 70 of the *Labour Relations Act*;
- (2) that it found the applicant had sufficient support for collective bargaining;
- (3) that it was not satisfied, however, that the true wishes of the employees would not be revealed by the taking of a representation vote. Therefore, the union's section 8 application was dismissed;
- (4) that it would remedy the violations of sections 64 and 70 with the usual notice to employees signed by an employer representative and that it would order the employer to permit the union to meet with employees; and,
- (5) that the Board directed the taking of a representation vote.

Our reasons for these rulings are set out in the following paragraphs.

11. In support of the assertion that it was entitled to section 8 relief, the union called R. Lacroix, Luc Hebert and P. Dube as witnesses. Counsel for the respondents called Mr. Paquin to testify. After assessing the evidence, including the credibility of the witnesses, the Board made the following findings of fact.

12. The union's application for certification was signed on February 5, 1986 and was filed with the Board on February 10, 1986. In accordance with the Board's Rules of Procedure, the Registrar fixed February 21, 1986 as the terminal date. In the presentation of its case for section 8 relief, the union focussed on two aspects of alleged employer misconduct. The union relied on a letter dated February 6, 1986 signed by Paquin. In addition, the union relied on statements made to employees by Paquin at a meeting held on February 17, 1986 at Hearst.

13. The February 6 letter from Paquin was distributed on February 7 by M. Bliss, a foreman, to approximately twelve skidder operators working in Barker Township on a conventional logging operation. At the top of the letter appeared the name of Sylvor Limitee and a copy of the letter was sent to D. Roy, a union representative. It appears from the evidence that at least a few of the Synco employees saw the letter. The English translation of the letter is as follows:

SYLVOR LTEE (LIMITED)

P.O. Box 2, Val Rita, Ontario

February 6, 1986

Dear Employee:

Our company requires from six to eight gangs to go to our work site at Levesque (Puskuta Township) for one more month. We will accommodate those who show the desire to work there, because here in Barker [Township] we will cease operations in a week and we would like to lengthen your period of employment.

In passing, we may have another work site to open immediately, but I have learned that the "Grands Marajahs [sic] of the Union" have started their hypocritical and disloyal marauding. They do not give a damn about putting you out of work so long as they are able to collect their union dues (\$27./month) and justify their high salaries. We will decide about wood to be cut as soon as Sylvor finds out about the success or failure of the Union's crass intimidation.

They would like to snare in their trap the faithful employees of Synco at Selin, employees who are moreover very qualified, but these same employees are distractedly scoffing these divine gentlemen because they believe themselves to be very well treated by Synco.

Do not forget, like I say so often to my employees, that it is their choice (and not the choice of the leaders of the Union to impose upon them) to desire the Union or not, at all times. This depends on their relationship with their employer and their Company.

With respect to Mr. Damien Roy, I wish him the best of luck, since out of four employees he has approached in the evening, by cajoling them, four have called me immediately to inform me of this cunning tactic as well as telling me that they did not want to know anything from this "painter of rosy pictures".

I will therefore be asking you to make arrangements with your foreman, Michael Bliss, in regard to those who can continue at Levesque.

Yours sincerely,

"Roger Paquin"

Roger Paquin

President

RP:jg

C.C. Damien Roy

14. The letter was sent only to the skidder operators in Barker Township since it was the work of this group of employees which was quickly coming to an end. In the letter, Paquin offers to transfer these employees to Puskuta Township. It is the second paragraph which causes the union concern. It is in this paragraph that Paquin refers to the possibility of another work site opening up but that the decision to cut wood on this site will depend on the "union's crass intimidation". By February 9, 1986, the employees working in Barker were advised that they did not have to go to Puskuta and, instead, would be transferred to Fushimi Township which was where the new work site referred to in the second paragraph of Paquin's letter was located. The cutting season for those employees working in Barker did not come to an end prior to the time when one would normally expect it to end.

15. During the few days prior to the meeting on February 17, 1986, Paquin received telephone calls from approximately four Synco employees, who called to advise him of the union's organizing efforts and to question him about their job security. The Synco group of employees work throughout the entire year and generally would have fewer years of service than employees working in the Sylvor group who would work for approximately nine months in a year. Paquin attempted to assure these employees about their immediate future by telling them not to worry about their jobs.

16. The meeting on February 17 was held on the employer's premises at Hearst. We are satisfied that Paquin expected to meet with a small number of Synco employees who he felt were concerned about some matters and wished to speak to him. As a result of his foreman's efforts, there were approximately twelve to fifteen persons in attendance. The union's concern about this meeting relate to comments made by Paquin about seniority and how a seniority system could effect the Synco employees, as well as comments Paquin made about a petition.

17. For the most part, the comments Paquin made at the meeting were directed to concerns that were raised by Synco employees. Paquin was asked whether or not certain Synco employees

could be bumped by more senior Sylvor employees. In the circumstances, we find it was reasonable for Synco employees to have such a concern. Paquin was asked whether or not the Synco operation would be closed. Paquin advised the employees that the union was not a “great big beast”, but rather was something positive. He explained that they should not fear the union people and that he has had a good relationship with the union representative over the years. The decision as to whether they wanted a union had to be made by each individual on his own and that they should continue to work as if nothing happened. Paquin indicated that the Synco operation would continue on as before. Paquin advised the employees that he was unaware of the union’s rules, but if they intended to operate on a seniority basis, this could affect junior employees at Synco. He indicated he would try to see if the union would agree to two seniority groupings. With respect to a petition, Paquin told the employees that if they did not want the union they should read the green sheet and that he understood someone would be circulating a petition. He told employees that if they did not want the union they should sign the petition. He advised employees not to sign the petition if they already signed a card. The evidence Paquin gave about the meeting essentially was not disputed by the evidence of the Synco employees called to testify by the union.

18. We are satisfied that the comments in the second paragraph of the February 6 letter, in addition to some of the comments of Paquin concerning the petition, constitute conduct which contravenes sections 64 and 70 of the *Labour Relations Act*. But as the Board has indicated on a number of occasions, it is not every contravention of the Act which will provide a basis for certification under section 8. In *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848, the Board made the following comments regarding the purpose of section 8 at page 1858:

... The purpose of section 8 is aimed at redressing the rights of employees and their trade union when an employer has committed breaches of the Act so flagrant as to inhibit the ability of the employees to freely choose whether or not they wish to be represented by a trade union, be it by way of signing cards or by way of casting a ballot in a representation vote. (See *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. April 269; *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562; *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734). Normally a violation inhibiting employees’ ability to choose is where the job security of employees is threatened (see *Dylex Limited*, [1977] OLRB Rep. June 357; *Sommerville Belkin*, [1980] OLRB Rep. May 796; *A. Stork and Sons Ltd.*, [1981] OLRB Rep. Apr. 419; *Straton Knitting Mills Limited* [1979] OLRB Rep. Aug. 801; *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338). Section 8 was designed to eliminate a respondent’s “reward” for breaches of the Act which have resulted in a depressed membership evidence such as that so few cards were signed either that certification without a vote cannot occur or that a vote never could have been ordered in the first place (see *Skyline Hotel Limited*, *supra*, at paragraphs 61 and 62). Section 8 is not intended to be a “punishment” for the respondent (see *Radio Shack*, [1974] OLRB Rep. Dec. 1220), nor intended to allow an applicant to advance a campaign for members beyond its normal course (see *District of Algoma Home for the Aged*, *supra*).

19. We are not satisfied that the respondents have committed breaches of the Act so flagrant as to inhibit the ability of the employees to freely choose whether or not they wish to be represented by a trade union by casting a ballot in a representation vote. We agree with counsel for the respondents when he argued that Synco employees, acting reasonably, would not view the comments in the February 6th letter as having any application to them. The February 6th letter was directed to Sylvor employees and related to circumstances which in no way could apply to employees working in the pulpwood operation. The letter was distributed to a very small percentage of the Sylvor employees. Shortly after receiving the letter, these employees would have realized that Paquin did not intend to carry out the threat contained in the second paragraph of the letter since they were provided work to the end of the season at a new work site.

20. The comments Paquin made at the meeting on February 17 were in response, for the

most part, to concerns raised by the employees. In examining all of Paquin's comments at the meeting, in light of what he said about the union, we are satisfied that he did not make threats to employees concerning their job security. In fact, Paquin attempted to reassure them that their jobs would be protected and that he would attempt to ensure that a seniority system would not work to their disadvantage. Although Paquin did advise employees to sign the petition if they did not support the union, one must view this statement in the context of what he said about the union and that he advised employees not to sign the petition if they had signed a card.

21. The Board hereby confirms the oral rulings it made at the hearing on December 3, 1986. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondents in the bargaining unit, at the time the application was made, were members of the applicant on February 21, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

22. A representation vote will be taken of the employees of the respondents in the bargaining unit. All employees of the respondents in the bargaining unit on December 3, 1986 who do not voluntarily terminate their employment or who are not discharged for cause between December 3, 1986 and the date the vote is taken will be eligible to vote.

23. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondents.

24. Having found the respondents in breach of sections 64 and 70 of the Act, the Board orders:

- (1) that the respondents deliver to each employee prior to the representation vote a copy of the attached notice signed by Mr. Paquin marked "Appendix" in both English and French as supplied by the Board;
- (2) that representatives of the union be given an opportunity to hold a meeting or meetings which are to be held prior to the representation vote at a location satisfactory to the union. We will leave it to the parties to determine the details of such meeting or meetings, i.e. the timing of the meeting and the manner in which employees will be compensated. If the parties are unable to agree on these details, the Board will make the necessary directions. Such meetings will take place without the presence of any member of management; and,
- (3) that the respondents cease and desist from engaging in conduct which contravenes sections 64 and 70 of the Act.

25. When the Board advised the parties of its oral rulings relating to the section 8 issue, counsel for the union indicated his client would like some time to consider its position. By letter dated December 29, 1986, counsel for the union advised the Board that the parties desired the assistance of a Board Officer to assist the parties in making voting arrangements and to assist the parties in implementing the remedies ordered in the section 89 complaint. For these purposes, the Board hereby appoints a Board Officer to assist the parties and report back to the Board.

26. This matter is referred to the Registrar.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

DELIVERED BY ORDER OF THE ONTARIO LABOUR RELATIONS BOARD

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAY OFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

SYLVOR LIMITÉE
SYNCO TIMBER LIMITED

PER: _____
ROGER PAQUIN
PRESIDENT

THIS IS AN OFFICIAL NOTICE OF THE BOARD AND MUST NOT BE DEFACED

L'Appendice

Loi sur les relations de travail

AVIS AUX EMPLOYÉS

LIVRE CONFORMÉMENT À UNE DÉCISION DE LA COMMISSION DES RELATIONS DE TRAVAIL DE L'ONTARIO

NOUS AVONS EMIS CET AVIS AFIN DE NOUS CONFORMER À UNE DÉCISION DE LA COMMISSION DES RELATIONS DE TRAVAIL DE L'ONTARIO, LAQUELLE FUT RENDUE SUITE À UNE AUDIENCE OÙ LA COMPAGNIE ET LE SYNDICAT AVAIENT L'OCCASION DE SOUMETTRE DES PREUVES. LA COMMISSION DES RELATIONS DE TRAVAIL DE L'ONTARIO A TROUVÉ QUE NOUS AVONS COMMIS UNE INFRACTION À LA LOI SUR LES RELATIONS DE TRAVAIL DE L'ONTARIO, ET NOUS A DEMANDÉ D'INFORMER NOS EMPLOYÉS DE LEURS DROITS.

LA LOI SUR LES RELATIONS DE TRAVAIL DONNE À TOUS LES EMPLOYÉS LES DROITS SUIVANTS:

LE DROIT DE SE SYNDICALISER;

LE DROIT D'ORGANISER UN SYNDICAT, D'Y ADHÉRER ET DE PARTICIPER À SES ACTIVITÉS LÉGITIMES;

LE DROIT D'AGIR ENSEMBLE EN VUE DE LA NÉGOCIATION COLLECTIVE;

LE DROIT DE REFUSER DE PARTICIPER À N'IMPORTE LAQUELLE DE CES ACTIVITÉS.

PAR AILLEURS, NOUS VOUS DONNONS LES ASSURANCES SUIVANTES:

NOUS NE FERONS RIEN QUI ENTRAVE CES DROITS.

NOUS NE PRATIQUERONS AUCUNE INTIMIDATION NI ABUS D'INFLUENCE AUPRÈS DE VOUS, QUE CELA SOIT PAR LE BIAIS DE RÉUNIONS OU D'ENTRETIENS AVEC DES PARTICULIERS OU AUTREMENT, EN VUE DE VOUS EMPECHER DE VOUS PRÉVALOIR DE VOTRE DROIT D'ASSOCIATION ET DE PARTICIPATION AUX ACTIVITÉS LÉGITIMES D'UN SYNDICAT.

NOUS N'ALLONS PAS METTRE À PIED, CONGÉDIER NI MENACER DE METTRE À PIED OU CONGÉDIER UN EMPLOYÉ OU UNE EMPLOYÉE EN RAISON DES ACTIVITÉS OU SYMPATHIES SYNDICALES DE L'EMPLOYÉ(E).

NOUS N'ALLONS PAS AUTREMENT EMPECHER, RESTREINDRE OU CONTRAINDRE NOS EMPLOYÉ(E)S EN CE QUI CONCERNE LEUR EXERCICE DES DROITS QUI LEUR SONT ACCORDÉES EN VERTU DE LA LOI SUR LES RELATIONS DE TRAVAIL.

NOUS ALLONS NOUS CONFORMER À TOUTES LES DIRECTIVES DE LA COMMISSION DES RELATIONS DE TRAVAIL DE L'ONTARIO.

SYLVOR LIMITÉE
SYNCO TIMBER LIMITED

PAR: _____
ROGER PAQUIN
PRÉSIDENT

CECI EST UN AVIS OFFICIEL DE LA COMMISSION, ET IL EST INTERDIT DE LE LACÉRER.

3472-84-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, Applicant, v. Labourers' International Union of North America, Local 597 and **Steen Contractors Limited**, Respondents, v. Milne and Nicholls/Vanbots Joint Venture, Intervener

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Sector Determination - Work dispute concerning the installation of storm sewers and catch basins - Whether merits of dispute should be deferred until Board determines into which sector of the construction industry the work in dispute falls

BEFORE: *Harry Freedman*, Vice-Chairman and Board Members *J. Wilson* and *C. A. Ballentine*.

APPEARANCES: *Laurence C. Arnold* for the applicant; *S. B. D. Wahl*, *T. Connolly* and *D. Little* for the respondent union; *S. C. Bernardo* and *Jim Thomson* for the intervener and Ontario General Contractors Association; *Allan Jones* and *Sandy Cochran* for Metropolitan Toronto Sewer and Watermain Contractors Association; no one appearing for the respondent Steen Contractors Limited.

DECISION OF THE BOARD; January 9, 1987

1. This is a complaint concerning the assignment of certain work relating to the installation of storm sewers and catch basins within the property lines and outside the perimeter of the buildings at the General Motors Stamping Plant Construction Project in Oshawa.

2. Counsel for Local 463 submits that the hearing and determination of the merits of the dispute be deferred until the Board determines, pursuant to section 150 of the *Labour Relations Act*, into which sector of the construction industry the work in dispute falls. The other parties oppose that submission and urge the Board to deal with the merits of the complaint, and, if necessary, the sector issue as one of the issues to be resolved in determining the merits of the complaint.

3. Milne and Nicholls/Vanbots Joint Venture is the general contractor at the General Motors project. The mechanical subcontract was awarded to Steen Contractors Ltd. Steen Contractors Ltd. sub-contracted some of its work, including the work in dispute to Valentine Enterprises Contracting. For purposes of this preliminary motion, the parties agreed that Steen Contractors Ltd. and Milne and Nicholls/Vanbots Joint Venture are bound to the relevant Provincial Agreement to which Local 597 is bound. Valentine Enterprises Contracting and Local 597 are bound to a collective agreement that applies to the sewers and watermains sector of the construction industry. Steen Contractors Limited is also bound by the provincial agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council to which Local 463 is bound.

4. We agree with the submissions of counsel for Local 463 that the determination of the sector of the construction industry into which the work in dispute comes is an important issue in this proceeding. While the sector determination may not be as significant to Local 597 because at least one of the collective agreements by which Local 597 is bound applies at least to either the sewers and watermains sector or the industrial, commercial and institutional sector, it is particularly significant to Local 463 since Local 463 may not be bound to a collective agreement applicable to the sewers and watermains sector with any of the parties to this proceeding.

5. Additionally, the determination of the sector issue may well also affect the type and relevance of evidence that the parties might wish to call with respect to the merits of the work assignment complaint.

6. The Board may determine into which sector of the construction industry that the work in dispute falls pursuant to section 150 of the *Labour Relations Act*. While that type of determination may be characterized as a collateral issue in a Board proceeding (see, for example, *Ecodyne Ltd.*, [1979] OLRB Rep. July 629) the Board has recognized that the importance of a sector determination goes beyond the immediate parties to the proceeding in which the sector issue is raised.

7. In *Harbridge & Cross Ltd.*, [1979] OLRB Rep. April 313, the Board made it clear that as a procedural matter, a sector determination could involve a large number of parties. The Board wrote at page 314:

“Section 135 [now section 150] clearly indicates who may make an application and refers to ‘work to be performed by employees’. It appears to the Board that the project with respect to which any question arises either with reference to present or future work must form the point of departure in determining which persons have status to participate in a proceeding under section 135.

In our view, in order for a person to have standing to participate in a proceeding under section 135 such a person is required to have a direct connection with the project wherein the question arises or will arise. A direct connection is possessed by a person who employs employees who are working or who will work on the project; trade unions or counsel of trade unions which have bargaining rights for employees who are working or who will work on the project; and employer bargaining agencies, employee bargaining agencies and affiliated bargaining agents which represent the employers, trade unions or counsel of trade unions which have bargaining rights for employees who are working or who will work on the project; and employer bargaining agencies, employee bargaining agencies and affiliated bargaining agents which represent the employers, trade unions or employees previously referred to in this paragraph.”

8. Where a sector determination is material to the proceeding in which it has arisen, the Board has, in the past, deferred consideration of the merits of the dispute until the sector determination is made. The Board has also applied the reasoning of *Harbridge & Cross Ltd.*, *supra*, to determine the standing of parties in a sector determination. See *Harbridge & Cross Ltd.*, *supra*, *West York Construction Ltd.*, [1980] OLRB Report Jan. 119; *Sword Contracting Ltd.*, [1985] OLRB Rep. May 743; *Ellis Don Ltd.*, [1985] OLRB Rep. May 743; *Ellis Don Ltd.*, [1985] OLRB Rep. Aug. 1204; and *Armbro Materials Ltd.*, [1986] OLRB Rep. May 579.

9. Counsel for Local 463 and counsel for the intervener, in addition to submitting that the sector determination is not particularly relevant because of the collective bargaining relationships that the Labourers have, also submitted that the sector issue was disposed of by the Board’s decision in *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1986] OLRB Rep. Oct. 1362. In establishing general guidelines for determining which employers should be included on the list of employers, in that accreditation proceeding, the Board stated:

“Second, as a general rule, the Board will consider employers of employees for whom the respondent has bargaining rights in Board area #8 in the sewers and watermains sector who are performing the following work in Board area #8 to be doing work coming within the unit of employers found by the Board to be appropriate for collective bargaining:

The installation of main and/or lateral sewers and their appurtenances for the collection and transportation of sewage and storm water and main and/or lateral watermains and their appurtenances for the supply of water, whether installed in conjunction with any other works or services, along public roads, easements or allowances or

within private property lines up to three feet of any building or structure; regardless of the ultimate use of the private property."

[emphasis added]

10. The Board's determination in that case is certainly of some precedential value, but we do not accept that it is dispositive of the sector issue in this case. That decision involved a board area different from the board area in which this complaint arose and also involved different trades. Indeed, as the Board indicated in *West York Construction (No. 2)*, [1983] OLRB Rep. Dec. 2132, local area practices are relevant in making sector determinations. The Board stated in that case at 2142:

"Lacking a definition of either the residential or the ICI sector of the Act, the Board is required to determine the dividing line between them with limited statutory guidance. In determining the matter, we incline to the view that as far as reasonably possible our conclusion should be one which takes into account existing industrial relations realities. We would refer in this regard to our earlier expressed view that by incorporating the notion of sectors into the Act, the Legislature did not thereby intend to change the existing understanding between trade unions and employers as to the scope of the different sectors. We recognize that local practices and understandings might vary in different parts of the Province and that our approach has at least the potential for different results in different areas. We also recognize that this might create a number of uncertainties. Nevertheless, we view such a situation as something that both trade unions and employers can accommodate themselves to. Indeed, *if* the result of this approach is that the line separating the residential and ICI sectors is somewhat different in various parts of the Province, it would be precisely because trade unions and employers in different parts of the province have already adopted different approaches to the issue.

This is not to say that local area practices or local agreements will always be determinative. Most projects clearly fall within one sector or another, and a local practice or agreement cannot alter that fact. Accordingly, an agreement to regard a clearly ICI project such as a shopping plaza or a school as residential would not find much favour with the Board. Rather, it is only with respect to those relatively small number of projects which fall into the 'grey area' between the sectors that a widely accepted local practice or agreement might assist in deciding how the project should be characterized. We would caution, however, it is possible that for one reason or another other relevant factors might be persuasive enough to cause the Board to conclude that a local practice or agreement should not be followed. Each situation will have to be determined on the facts involved."

See also *Sword Contracting Ltd.*, *supra*, at 754.

11. Counsel for the respondent and counsel for the intervener also emphasized that much of the evidence that would be relevant to the sector determination based on the principles set out in *West York No. 2*, *supra*, would also be relevant to determining the merits of this complaint before us. Counsel submitted that bifurcating the proceedings would unduly prolong them and result in the duplication of a great deal of evidence. Counsel also submitted that since the work in dispute is completed, no parties other than those already involved in this proceeding have any interest in the manner. Counsel argued that in as much as all parties affected were already before the Board, the hearing should proceed on the merits with the Board determining the sector issue as simply another issue to be resolved at the conclusion of the case. Counsel relied on *Teperman & Sons Ltd.*, [1980] OLRB Rep. June 788.

12. The Board, in *Armbro Materials and Construction Ltd.*, *supra*, in deferring consideration of the merits of a work assignment dispute pending a sector determination, wrote at page 582:

"... It is evident to us from the submissions of the parties and the contents of their pre-hearing briefs that in order to resolve the matters in dispute between the parties, including the second and third 'preliminary issues' set forth above [the scope of relevant area practice and the applic-

able collective agreements], and the merits of this jurisdictional complaint, it will be necessary for the Board to determine whether the work in dispute is within the ICI sector, as contended by the complainant, or within the sewers and watermains sector, as contended by the respondents. We are further of the view that the issue of whether that work comes within the ICI sector should be determined under section 150 of the Act prior to the determination of any other issues relevant to this complaint, including the two aforementioned 'preliminary issues'. In our view, *this approach is likely to prove the most expeditious manner of proceeding*, since the determination of that matter will assist in determining the relevant area practice and the applicability of the respondents' collective agreement, and may also be of considerable assistance to the parties in resolving or narrowing this complaint.

10. Since the issue of whether or not the work in dispute comes within the ICI sector is integral to the merits of this complaint, *we feel that no useful purpose would be served by requiring that the determination under section 150 be made the subject matter of a separate proceeding*. Accordingly, we propose to adopt a procedure analogous to that adopted by the Board in *West York Construction, supra*. The matter will be relisted for hearing for the purpose of entertaining evidence and representations with respect to a determination under section 150 concerning whether or not the site services at the Honda plant building project at Alliston, Ontario, from the property line to the building line, is within the industrial, commercial, and institutional sector of the construction industry. For that aspect of the proceedings, in addition to the existing parties, any trade union, council of trade unions, employer, or employers' organization having a direct connection with the project will have long standing to participate. A Board Officer is hereby authorized to meet with the parties to assist them in identifying the parties which have standing to participate in that aspect of the proceedings, and to report to the Board on the extent of agreement or disagreement respecting that matter. (See *Ellis-Don Limited*, [1985] OLRB Rep. Aug. 1204)."

[emphasis added]

13. We respectfully agree with that approach. We do note, however, that the deferral in that case was based, in large part, on the Board's perception that it would be "the most expeditious manner of proceeding." If no persons other than the parties to this proceeding wish to participate in the sector determination, then it is clear to us that the matter should proceed as suggested by counsel for the respondent and counsel for the intervener and in the way contemplated by the Board in the *Teperman & Sons Ltd.* decision, *supra*.

14. Therefore, we hereby authorize a Labour Relations Officer to meet with the parties in order to prepare a list of persons, employers' organizations, and unions who should be given notice of the sector determination aspect of this proceeding and to report back to the Board. Since much of the evidence relating to the sector issue may also be relevant to the merits of the complaint, the evidence relevant to the sector determination that is also relevant to the merits of the complaint will be applied by the Board in dealing with the merits of the complaint. The Registrar is hereby directed to assign the same panel of the Board to the hearing of the sector determination and to the hearing of the merits of the complaint.

15. While this panel of the Board is not seized with this matter, we are hereby requesting the Registrar, if possible, to schedule the balance of this proceeding before this panel of the Board.

3127-85-R; 3128-85-R; 3129-85-R; 3130-85-R; 3131-85-R; 3132-85-R; 3133-85-R; 3186-85-R; 3187-85-R; 0277-86-R Val McKean, et al, Applicants, v. Retail, Wholesale and Department Store Union, Respondent, v. **T. Eaton Company Limited**, Intervener

Petition-Termination - Employer giving wage increases to employees in its non-unionized stores but not to employees covered by collective agreements - Purpose of increase not the origination of termination applications - Supporters of petitions including department section heads - Employees not perceiving section heads as agents of management - Petitions found voluntary - Representation votes ordered

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *W. H. Wightman* and *R. Montague*.

APPEARANCES: *Stewart D. Saxe, Cheryl Elliot, David Cote, Johannah Bernstein, Barb Murray, Suzanne O'Hagan, Jeane Christie, Val McKean, Colin Waring, Susan Baker, Una L'Estrange* and *Mabel Alexander* for the applicants in all but Board Files 3186-85-R and 3187-85-R; *B. W. Adams, Chris Aquil, Kevin McTavish* and *Denise Pigeau* for the applicants in File Nos. 3186-85-R and 3187-85-R; *Paul Cavalluzzo* and *Bernie Hanson* for the respondent; *H. A. Beresford, R. A. Hubert* and *Barry G. Puckett* for the intervener.

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN; January 23, 1987

I

1. In each of these ten applications under section 57 of the *Labour Relations Act* ("the Act"), the applicant(s) seek(s) a declaration that the respondent trade union no longer represents a particular unit of employees of T. Eaton Company Limited ("Eatons") at one of five store locations:

Applications filed March 20, 1986:

Bramalea City Centre

20 City Centre, Brampton

3 units:

full-time sales employees - Board File 3132-85-R

part-time employees - Board File 3130-85-R

part-time office employees - Board File 3131-85-R

Scarborough Town Centre

300 Borough Drive, Scarborough

2 units:

full-time sales employees - Board File 3127-85-R

part-time sales employees - Board File 3133-85-R

Shoppers' World

3003 Danforth Ave, Toronto

2 units:

full-time sales employees - Board File 3128-85-R

part-time sales employees - Board File 3129-85-R

Applications filed March 26, 1986:

Pen Centre

St. Catharines

2 units:

full-time sales employees - Board File 3186-85-R

part-time sales employees - Board File 3187-85-R

Application filed April 24, 1986:

Yonge-Eglinton Centre

2300 Yonge Street, Toronto

1 unit:

part-time sales employees - Board File 0277-86-R

An application under section 57 filed April 24, 1986, with respect to full-time sales employees at the Yonge-Eglinton Centre location is the subject of a separate decision. That application and the ten applications dealt with in this decision were heard together because certain issues of fact and law were common to all of them.

2. The first nine of these applications were scheduled for hearing April 22 and 23, 1986. Counsel for the parties, all experienced in matters of this kind, estimated that evidence and argument in all nine applications could be completed in 9 additional days, and a series of 9 further hearing dates ending July 23rd were scheduled. After the two applications with respect to the Yonge-Eglinton Centre store were filed and added to those to be heard in this consolidated fashion, the estimate of counsel increased by 2 days, and a hearing schedule ending September 2, 1986, was established to accommodate this revised estimate and other scheduling difficulties which had arisen in the meantime. The estimates of counsel increased again in July and, in the end, hearings begun on April 22 and 23, 1986, occupied 15 further hearing days between May 26 and December 19, 1986, when counsel completed their closing arguments.

3. Subsection (3) of section 57 of the Act provides that:

57.-(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

April 3, 1986, was fixed as the terminal date for the applications in Board Files 3127-85-R to 3133-85-R, inclusive. In accordance with the Board's usual practice, that is the date (hereafter referred to as "the assessment date") which we determine under clause 103(2)(j) of the Act to be the time

as of which evidence of signification by employees that they no longer wish to be represented by the respondent trade union must be presented to the Board in those applications. On the same basis, we fix April 8, 1986, as the assessment date in Board Files 3186- and 3187-85-R, and May 8, 1986 as the assessment date in Board File 0277-86-R.

4. With respect to each of these applications, by its terminal date solicitors for the applicant(s) had filed with the Board one or more documents (hereafter referred to as “petitions” or “petition documents”) which bore the signatures of persons employed in the subject unit on the application date and a heading signifying that the signatories no longer wished to be represented by the respondent. With respect to three of these applications (Board Files 3186-85-R, 3187-85-R and 0277-86-R), the respondent had filed documents (“counterpetitions”) bearing employee signatures and a heading signifying that the signatories wished the respondent to continue as bargaining agent for employees at the subject location. The Board considers only the last voluntary signification of wishes made by an employee on or before the assessment date when making the assessment required by subsection 57(3): an employee who signs a petition and later voluntarily signs a counterpetition filed on or before the assessment date is not treated as having signified “at such time as is determined under clause 103(2)(j)” that she no longer wishes to be represented by the trade union identified in the petition and counterpetition. Even assuming that each of the employees who signed both a petition and a counterpetition signed the counterpetition last and that all counterpetition signatures were voluntary, however, the counterpetitions would not affect the outcome in any of those three cases. In each of the ten applications, the number of employees whose signatures appear on a petition and not on a counterpetition constitute not less than 45 per cent of those employed in the subject unit on the application date.

5. In an application of this kind, the applicant is required to adduce the evidence of witnesses with personal knowledge with respect to the origination and circulation of each petition document and the circumstances in which each signature thereon was obtained. In all of these applications the issues are whether the applicants have satisfied that basic evidentiary onus and whether, having regard to all of the evidence, we can find that the petition documents represent a “voluntary” signification of the wishes of those who signed them. We do not propose to review here the evidence of each of the 33 witnesses who testified in these proceedings. In view of the results, we will concentrate on the particular matters on which counsel for the respondent union focused his attention during argument. Before examining those arguments which were specific to individual applications or store locations, we will deal with certain features which are common to all ten applications.

II

6. The respondent organized and was certified with respect to the bargaining unit employees in these five Eaton’s stores on various dates in the period from March to June of 1984. The union commenced a strike at the end of November 1984. It then filed a complaint with the Board alleging that Eaton’s had failed to bargain in good faith and make every reasonable effort to make a collective agreement. That application was substantially unsuccessful: *T. Eaton Company Limited*, [1985] OLRB Rep. Mar. 491. Meanwhile, a number of employees in each bargaining unit either refused to support the strike or returned to work after a few days. The strike ended in May 1985, when the union entered into collective agreements with Eaton’s without first conducting a ratification vote among bargaining unit employees. Groups of employees at the Scarborough Town Centre and Bramalea City Centre stores then filed complaints with the Board, alleging that the union had breached the Act by failing to follow that union’s usual practice of conducting a ratification vote before entering into a collective agreement. Those complaints were dismissed in *T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309, where the Board, after observing that their

effect as bars to possible terminations applications under subsection 57(1) of the Act was one of the reasons given by the union for its entering into collective agreements with Eaton's, noted that:

[T]he union has not and cannot remove the right of employees, if they so desire, to raise the issue of whether the union should continue as their bargaining agent. What has happened is that in accordance with the terms of the Act, the possibility of this occurring has been postponed until the last two months of the collective agreements now in operation.

It is apparent that there are employees in each of the stores who have been waiting since then for the opportunity to file termination applications.

7. It is also apparent from the evidence that when the petitions before us were prepared and circulated, employees in each of the bargaining units were highly polarized in their views on the desirability of representation by this union, and had been for some time. Members of pro- and anti-union employee groups could readily be identified by one another as a result of their past participation or non-participation in the strike, past conversations and confrontations, the pins or buttons some wore and the tendency of like-minded employees to associate during meal and coffee breaks. In general, the impetus for these applications in fact came, and in these circumstances would have been perceived to come, from employees whose opposition to the union was long established and well known. While these applications appear to have substantial support, the union does too. These applications were not unexpected, nor was the degree of scrutiny to which they and those who support them were subjected before and during these proceedings. Many of the union's rank and file members supporters will have been watching for any evidence which could be used to defeat these applications.

8. A common basis for the union's opposition to each of these applications is that during the one year term of the union's first collective agreements with Eaton's, Eaton's gave wage increases to employees in its non-unionized stores but not to employees covered by those agreements (who are said to represent less than five per cent of the total number of employees of Eaton's), whom it continued to pay at the rates specified in those agreements. The particular focus of this defence was on a five per cent increase granted to sales employees in Toronto stores in November of 1985. The union concedes that these actions did not constitute a violation of the Act or of any of the collective agreements, but argues that they nevertheless sent bargaining unit employees a signal that continued union representation would have adverse economic consequences, and that this occurrence alone, or in combination with other factors, prompted the petitions which circulated thereafter, and should therefore lead us to find that those petitions were not "voluntary." It should be noted that there is no evidence before us that any employee has ever been discriminated against by Eaton's management because of his or her support for the union. Except for the Board's finding (in [1985] OLRB Rep. Mar. 491) that Eaton's position in bargaining with respect to union activity on company premises had been overly broad (and a similar finding in *T. Eaton Company Limited*, [1985] OLRB Rep. 941, that an overly broad "no solicitation" rule applied at its downtown Toronto Eaton's Centre store had violated sections 64 and 66 of the Act), it has not been found guilty of and does not now stand accused of any breach of the *Labour Relations Act*.

9. The introduction of this wage increase issue led to our hearing evidence about the historic pattern and timing of wage increases at Eaton's stores before any of them was organized, the discussions with respect to wages and wage increases during the 1985 negotiations which led to the union's first collective agreements with Eaton's, the extent to which the subsequent wage increases at unorganized stores attracted attention among bargaining unit employees either before or after petitions began circulating, the union's response after learning of the increases, its assessment of the effect of the increases on its collective bargaining position and the position it then took in its

communications with bargaining unit employees and Eaton's with respect to the wage increases sought in 1986 negotiations for the renewal of the first collective agreements. Having heard that evidence and the ensuing argument, we find the following passages from the majority decision in *Ontario Hospital Association*, [1980] OLRB Rep. December 1759, particularly apt:

6. In the course of the evidence, counsel for the respondent insisted upon his right to place before the Board the full history of the bitter relationship that had evolved between the employer and the respondent, including the various items of propaganda which characterized that relationship. Counsel's purpose was to demonstrate to the Board that the real "mover" behind the petition was the employer itself, who by its conduct and statements had deliberately created an atmosphere which was calculated to, and did, lead directly to a termination application. The Board at the outset indicated its reservations over the relevance of that line of inquiry, but ruled that it could not say with certainty that the respondent's evidence would not disclose employer conduct or statements linked to the termination application. The respondent accordingly was permitted to proceed in the fashion counsel sought. This, of course, prompted the employer to counter with evidence showing the statements and events of that history in a different light, aimed at demonstrating to the Board that it was more likely the actions of the UAW and its supporters which prompted the termination application. The net effect of all of this was to transport into the hearing-room, and make a part of these proceedings, the very dispute which characterized this relationship on the outside, to the obvious detriment of those petitioning employees seeking a timely response from the Board to their application. As Ms. Cowan, one of the employees who acted as spokesperson for the petitioners, stated in her eloquent summation, she and her co-petitioners had no interest in getting involved in the dispute between the company and the union, and submitted that the employees throughout the history of this bitter conflict had become the "forgotten people".

7. The Board's experience with the present proceeding has confirmed the wisdom of the more narrow evidentiary approach which it adopted in the *Ottawa Journal* case, [1978] OLRB Rep. Mar. 291, where the matters sought to be relied upon by the respondent trade union were not a great deal different from the present case. In refusing to entertain such evidence, the Board had this to say:

7. Counsel for the respondent asks the Board to draw the inference that because of the climate generated by the protracted labour dispute the statement in support of the termination application is not a voluntary one. In so doing the respondent is asking the Board to draw the inference that free expression has been thwarted because of circumstances *not directly related to the origination, preparation and circulation of the statement*. Even if the Board assumes that the respondent can establish the material facts upon which it intends to rely - and indeed a number of these facts are a matter of record having been set out in the Board's decisions dealing with the section 79 complaints brought by the parties - the Board would not be prepared to draw the inference which the respondent suggests. (emphasis added)

While the history of the underlying labour dispute may be of some relevance to the issue before the Board on a termination application, it is essentially a collateral matter and may be of so little weight as to justify a different balancing of interests than that adopted by the Board in the present case. The Board finds nothing in the evidence, notwithstanding the olympian efforts of counsel for the UAW, to demonstrate to it that the actions of Blue Cross had as their real purpose the origination of a termination application, or prevented employees from making up their own minds on union representation.

We do not understand the Board's decision in *Radio Shack*, [1978] OLRB Rep. Nov. 1043, as suggesting that every matter or occurrence capable of being described as part of an "overall environment created by the employer" can be said to affect the voluntariness of a petition signature. The sentence from that decision which is relied on by the respondent and emphasized in the passage quoted by Board Member Montague in paragraph 4 of his dissent must be read together with the two sentences and the case citation which follow it. Having regard to that context and factual circumstances with which the Board was dealing in *Radio Shack*, *supra*, and in the case cited in the

passage quoted in our colleague's dissent, it seems apparent that the environmental characteristics which the Board then had in mind were employer acts or omissions which, however innocent, would give rise to an objectively reasonable belief that management was involved in the circulation of a petition or would be likely to learn who signed it. The Board did not have before it in those cases the kind of environmental facts thrust upon the Board in *Ottawa Journal*, *supra*, and *Ontario Hospital Association*, *supra*. As is apparent from the passage our colleague quotes from *Irwin Toy Limited*, [1983] OLRB Rep. July 1064, the wage increase discussed there was part of an entire pattern of behaviour which was left entirely unexplained in the face of an allegation that it violated the Act. Here there is an explanation which is virtually unchallenged, and there is no unfair labour practice allegation. The *Irwin Toy* decision cited by the respondent does not establish any principle of general application about the effect of wage increases for unorganized employees on the voluntariness of petitions circulated among organized employees.

10. Just as in *Ontario Hospital Association*, the response to the union's "atmosphere" argument here was that the actions of the union were the more likely cause of the termination application. It is not the Board's function in an application of this kind to assess the respondent union's representation of the employees in the units affected by these applications, nor to assess the wisdom of choices employees may have made or wish to make about representation by this or any trade union. There is a great danger that it will appear or be made to appear otherwise if the Board engages in extensive analyses of arguments of this kind. We propose to say no more about the wage increase issue than this: like the majority in *Ontario Hospital Association*, *supra*, on the evidence before us we conclude that the wage increases in Eaton's unorganized stores did not have as their real purpose the origination of termination applications in its unionized stores, nor would knowledge of those wage increases have prevented employees from making up their own minds about continued representation by this union.

11. A factor common to nearly all of these applications, and another basis for the union's opposition of those applications, is that one or more of those involved in the origination and circulation of the supporting petitions was a "section head." Section heads are full-time sales employees with additional administrative responsibilities for the particular section in which they work. Barb Murray, for example, is a section head in the sporting goods section at the Bramalea store. Six employees work with her in that section; all of them are part-time employees. She helps the manager in charge of that and other sections with the scheduling of the other employees in her section and allocates the work to be preformed in that section. She makes suggestions to the other employees about how to perform their work. The other employees usually follow her suggestions. She believes that is because she been working there longer than they have. She does not feel she has the power to give orders. If she thought an employee had to be given orders or disciplined, she would report the matter to her manager. That does not happen very often. Other section heads testified that they monitored and reported absences, scheduled or coordinated lunch break times and prepared time sheets for employees in their section. None was actually or effectively involved in hiring or firing. While the foregoing sketch does not provide an exhaustive list of the particular duties attributed to section heads in the evidence we heard, the duties referred to are representative of the duties of section heads at the Eaton's stores with which we are concerned. Section heads report to sales managers who each have responsibility for some number of related sections and whose offices are located in the store at a location near the areas they manage. Those sales managers and other in-store management personnel report in turn to the store manager.

12. The union does not argue that section heads are persons who exercise managerial functions within the meaning of clause 1(3)(b) of the Act. It is well understood that section heads are bargaining unit employees and not members of management. Most of the union stewards, employee bargaining committee members and local union executive members about whom we

heard were also section heads. The union's argument is that since section heads frequently act as conduits to and from management, employees may perceive them to be acting as agents of management in soliciting petition signatures and in making statements about the advantages of terminating the union's bargaining rights. Counsel further submits that section heads fall within a class described in this Board's jurisprudence as having "a greater proximity to managerial authority than other employees" (see *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545 at paragraph 25), and argues that the Board has been suspicious of the voluntary nature of petitions circulated by such people and has often been unwilling to accept them as voluntary. Counsel for the union cites various cases in which petitions have been found not voluntary: *Dad's Cookies Ltd.*, *supra*, (petition in certification application circulated by two women perceived and referred to as "foreladies" by employees); *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676, (petition in certification application circulated by head cashier with some managerial functions); *Apex Services*, [1983] OLRB Rep. Jan. 1, (working foreman actively involved in origination and circulation of petition in termination application); and *Quality Circuits Manufacturing Limited*, [1979] OLRB Rep. Aug. 794 (one of four "lead hands" who report directly to plant manager actively involved in origination and circulation of petition in certification application). On this point, counsel for the applicants cites various cases in which petitions have been found voluntary: *A. N. Shaw & Sons (Eastern) Ltd.*, [1980] OLRB Rep. Oct. 1347 (working foreman actively involved in origination and circulation of petition in termination application); *Kilgoran Hotels Limited*, [1975] OLRB Rep. Mar. 240, (head waitress with supervisory functions prepared and circulated petition in termination application); and *Matsushita Industrial Canada Limited*, [1981] OLRB Rep. Nov. 1605, (one of 15 group leaders, another of whom was a union steward, originated petition in termination application, and another encouraged employees to sign).

13. Each of the cases cited turns on its particular facts. None stands for the proposition that petitions originated or circulated by bargaining unit employees who have a "lead hand" type of role in the workplace cannot be voluntary, and counsel for the union does not contend that there is any rule to that effect. What is required is an analysis of the sort reflected in the following paragraphs from Board's decision in *A. N. Shaw & Sons (Eastern) Ltd.*, *supra*:

10. In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.

11. Employees would have been well aware of Mr. Foley's supervisory role, particularly in assigning work. They would also likely have been aware of the fact that he was responsible for making reports to management concerning their work performance. It is also reasonable to assume that the other employees would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union member within the bargaining unit. The evidence does not suggest that Mr. Foley did anything to indicate to the employees that he was acting on behalf of management. To the contrary, his case in favour of terminating the respondent's bargaining rights was based upon his view that union representation had acted to restrict the work available to himself and others. Along with the other employees he had been laid off for five or six weeks under circumstances where he felt he need not have been, and he blamed the existence of the collective agreement for this fact. When all of these considerations are taken into account, we feel that the other employees would more likely have regarded Mr. Foley as acting in what he perceived to be in his own interests rather than acting on behalf of management.

12. Before leaving this matter, we would note that this case differs in certain key respects from certification cases involving anti-union petitions. Here there has been no sudden and apparently inexplicable change of heart relating to union support on the part of employees who only a short time before had become union members. Further, the employees here have been represented by the union for some period of time and presumably they would have been aware of the union's ability to protect employees from being discriminated against for continuing to support the union.

In the circumstances of the cases before us, we have concluded that mere knowledge that an originator or circulator of a petition was a section head would not be likely to lead a bargaining unit employee to conclude that the petition was being circulated for or with the support of Eaton's and, thus, to fear that a refusal to sign would come to the attention of management. The mere fact that section heads were involved in initiating and circulating petitions filed in support of these applications is not a sufficient basis on which to reject any of the applications.

14. The vast majority of the over 1,000 employees affected by these applications are sales employees. Their individual work schedules vary considerably. Any given weekday will be a regularly scheduled day off for some employees. In addition, employees are entitled to a certain number of "flex days." These are personal holidays scheduled on days selected by the employee with the approval of his or her manager. Approval is normally given without discussion of the employee's reasons unless the absence would create a particular scheduling problem. When sales employees are working, the nature of their work requires that the times at which they take coffee and meal breaks vary among employees working in the same area of the store. It also requires that they move around in the store, and even leave the sales floor, without first seeking the permission of management. All of the witnesses agreed that it is common for employees to be seen speaking to one another, both in their usual sales area and while passing through other areas of the store. Subject to the limitation that employee interactions should not interfere with serving customers or completing necessary tasks, such employee conversations are not ordinarily the subject of discipline or adverse comment by management. Employees may be in the workplace other than during their regularly scheduled hours of work doing personal shopping, passing through on their way to or from other stores or, in some instances, doing extra work for which they do not expect to be paid. Events and employee interactions which would arouse in employees a reasonable suspicion of management involvement or support in the industrial environments with which a great many of the Board's decisions on voluntariness of petitions have been concerned would not provoke the same suspicion in this sort of workplace.

III

Bramalea Store

15. The respondent relies on the following four factors in support of its position that petition documents signed by employees at the Eaton's store at Bramalea City Centre are not voluntary:

- 1) Four of the five employees involved in the origination and circulation of those petitions are section heads.
- 2) It was common knowledge that petition documents were at Barb Murray's house and anyone could go there and see them.
- 3) Barb Murray, a key person in the origination and circulation of those petitions, advised Karen Skates, a part-time sales employee, that if she cut up her union card she (Murray) would give her more hours of work.

- 4) Employees at unorganized stores were given a five per cent wage increase and those covered by a collective agreement were not.

16. Barb Murray was a key person in the origination and circulation of petitions among employees in the three bargaining units at the Bramalea store. She lives a block away from the store. In the period during which petition documents were circulating, she kept some of those documents on her dining room table. In cross-examination, she conceded that anyone could have walked into her house when she was not there and examined the petition documents. Counsel for the respondent argued that awareness of the fact that anyone, including a member of management, could thus have gained access to the petition would have led employees to sign not voluntarily, but out of fear of adverse consequences of management's knowing who had not signed them. We do not accept that argument. While there was an open invitation of sorts to bargaining unit employees to attend at Ms. Murray's house to sign the petition, there is no suggestion that any member of management was invited to her house for that or any other purpose, nor that employees could have reasonably imagined that there had been such an invitation. Nothing in the evidence suggests that employees who considered the matter objectively would have thought it probable that members of Eaton's management would enter an employee's home without invitation in order to find out who was signing petition documents.

17. As we noted earlier, Ms. Murray is a full-time sales employee and section head in the sporting goods department at the Bramalea store. Karen Skates had been employed part-time at that store for about two years when, on January 11, 1986, she was involved in a conversation with Murray about the number of hours of work she was getting in the men's wear department. Ms. Murray admits saying "Maybe I'll let you work in sporting goods and work more hours if you rip up your union card." She says she meant this remark as a joke and that Ms. Skates behaved at the time as though she took it as a joke. It was Ms. Murray's evidence that she did not have the power to effect Ms. Skates' transfer to the sporting goods department or to get her more hours of work and, further, that Ms. Skates would have known that at the time. She was surprised when Ms. Skates later filed a grievance with respect to the incident. As a result, Ms. Murray was reprimanded by the store manager. Hers is the only version of the incident in evidence, and we have no reason to doubt her assertions about Skates' reaction and state of knowledge at the time. These circumstances are entirely distinguishable from those dealt with in *National Dry Company Ltd.*, [1980] OLRB Rep. Aug. 1217, on which counsel for the respondent relies. The circumstances of this incident do not lead us to conclude that Barb Murray was acting as an agent of Eaton's management when she began circulating petition documents a month later, nor is it likely that the incident led any employee to so conclude.

18. With respect to the effect on the voluntariness of the petitions at this store of the involvement of section heads and the wage increases at unorganized stores, nothing specific need be added to our earlier general comments about those factors. There is no suggestion that the applicants failed to discharge the onus of adducing first-hand testimony about the origination and circulation of the petitions on which they rely and the circumstances in which each of the signatures thereon was obtained. Having weighed all of the parties' evidence and argument and considered particularly the cumulative effect of the four factors referred to in paragraph 15, with respect to each of the three subject bargaining units at the Bramalea store we find on the balance of probabilities that not less than 45 per cent of the persons employed in the unit on the application date had voluntarily signified as of the assessment date that they no longer wish to be represented by the respondent trade union.

Scarborough Town Centre Store

19. The respondent relies on the following five factors as establishing that petition documents signed by employees at the Eaton's store at Scarborough Town Centre are not voluntary:

- 1) Val McKean, who was involved with Colin Waring in the origination and circulation of the petitions, was a section head.
- 2) The circumstances in which Val McKean was off work on February 19, 1986, the first day signatures were collected.
- 3) Les Freeman, an Eaton's employee at its Pickering store formerly employed at the Scarborough Town Centre store, was given "unusual tolerance" to leave work on occasions when he assisted Val McKean and Colin Waring with the petition.
- 4) The wage increase at unorganized stores.
- 5) The credibility of Val McKean.

20. There is one respect in which the respondent's section head argument with respect to Val McKean is different from its basic argument about section heads. The sales manager for her area, Joan White, left for vacation on February 21, 1986. Lynn Carson, an employee in the same area, says a note was put up at that time which said to see Val McKean if there were any problems while the sales manager was away. Many signatures obtained by Ms. McKean were obtained during the period Joan White was on vacation. Counsel argues that Val McKean was an acting manager during that period. Having reviewed the evidence, we are not persuaded that she either was or was thought of by employees as an acting manager on this or any other occasion before the assessment date.

21. Val McKean picked up blank petition documents at a meeting at her counsel's office on Sunday, February 9, 1986, (as did applicants from the Bramalea and Shopper's World stores) which she attended with Colin Waring and Les Freeman. They later discussed when she and Colin Waring would collect signatures. Eventually, they decided to start on Monday, February 17th and Wednesday, February 19th. In the meantime, Ms. McKean's grandmother died. She attended the funeral on Monday the 17th. She was to have brought the petition documents to Colin Waring at the mall that morning on her way to work. She did not go to work or deliver the petition documents on February 17th, so no signatures were obtained that day.

22. Ms. McKean returned to work on the 18th. After a while, she felt she was falling apart. She told Joan White (her sales manager) that she had thought she would be okay to come back to work the day after the funeral, but she was not and wanted to leave. Ms. White told her to take whatever time she needed. Ms. McKean spoke to Maria Cavelli, a section head in the jewellery area next to her own, about the fact she was leaving. She does not remember exactly what she said. Ms. Cavelli and Lynn Carson, another employee in the jewellery area, recall that she said she was going home sick, and that they should cross her off (the schedule) for the following day (February 19th) as well. Ms. Cavelli saw Joan White later that day, and commented on McKean's having gone home sick. Ms. White replied that Val had a couple of bereavement days coming to her and she might as well use them.

23. The original plan for February 19th had been that McKean would bring the petition documents to Colin Waring in the Scarborough Town Centre mall on her way to work, and Waring

(who had the day off) would then collect signatures in the mall. McKean did not feel up to going in to work. She was not expected at work. She decided to keep busy by helping to collect signatures. She arrived at the mall somewhat later than Mr. Waring expected, and helped him collect signatures in the mall for the balance of the day. As a result of seeing her there, Maria Cavelli went to Joan White and told her that although she understood Val McKean was away sick, she had seen McKean in the mall. Ms. Cavelli says John White's reply was that it was a flex day for Val and she could do that she liked with it. Ms. McKean acknowledges that she never requested a flex day.

24. We are asked to find that these facts would create in employees a perception that McKean had the support of management, by analogy with the fact situation dealt with in *Ontario Hospital Association, supra*, at paragraph 39 and following. We do not accept the argument. In *Ontario Hospital Association*, the employee circulating the petition got a day off "for personal reasons" then spent nearly the entire day in the workplace cafeteria soliciting signatures in full view of management personnel. This case is not at all the same. Counsel makes much of the confusion about whether the 19th was a sick day, a bereavement day or a flex day. The relevant perspective is that of an employee who signed or was asked to sign the petition. We have already observed that in this workplace it is entirely unremarkable when an employee is away from work during hours when others are at work. Most employees would have known nothing of Ms. McKean's actual work schedule. If those employees even thought about why Val McKean was away from work on a Wednesday, they would have assumed that was because it was a scheduled day off for her, not because she had been given management permission to do what she was doing. Those relatively few employees who, by one means or another, may have known of the details of Ms. McKean's schedule and of the fact that she had gone home early on Tuesday would surely also have known, as Cavelli and Carson did, that her grandmother had died and that she was entitled to bereavement leave. They would also have known that she could do as she liked on bereavement leave, just as she could on a flex day.

25. Les Freeman worked at the Scarborough Town Centre store until June 1985. Thereafter, he worked at Eaton's new store in Pickering. It is not seriously suggested that he would have been perceived as a member of management at any relevant time. While at the Scarborough store, Mr. Freeman was among those who continued to work during the strike. He helped form support groups of employees who crossed the picket line, to assist them deal with what he calls intimidation by union people during the strike. He was one of the employees who brought the complaint about the union's failure to hold ratification vote. When that complaint was dismissed, the next step for the complainants was to organize a termination application when it became timely to do so.

26. After he left the Scarborough store in June 1985, Les Freeman still wanted to "carry through" on the actions he had helped start. He kept in touch with the people involved in the complaint as well as those involved in the support groups. Val McKean and Colin Waring had become involved with the latter groups after he left the store. He attended the meeting of employees at which McKean and Waring emerged as the people who would look after things in relation to termination applications. He went with them to the February 9th meeting at the lawyer's office. He took flex days in order to be at Scarborough Town Centre on Monday, February 17th and Wednesday, February 19th when signatures were to be collected. He was also in attendance in the mall when signatures were collected on February 22nd, which was a scheduled day off for him. At the request of McKean and Waring, he delivered certain of the petition documents to their lawyer's office on March 3rd. He was scheduled to commence work at 8:00 a.m. that day, but arrived at 10:30 a.m. and signed in as though he had arrived at 8:00 a.m. On March 10th he drove Colin Waring to the lawyer's office with more signed petition documents. He was scheduled to commence work at 8:00 a.m. that day as well, but again arrived around 10:30 a.m. and again signed in as though he had

arrived at 8:00 a.m. He said that on these two occasions he had permission to take time off but not to sign in the way he did.

27. With respect to the latitude he was given in taking time off, Mr. Freeman says he had worked extra hours during the Oakville store's opening and he had an informal understanding with his boss that he could take compensating time off at later times provided his job got done. Ron Hubert, General Manager of Employee Relations for Eaton's, testified that it is not at all unusual or uncommon for employees to ask for and be given time off in recognition of the extra time often spent by employees involved in store openings, and that a manager does have the discretion to grant time off with pay. None of this evidence was contradicted. There is no evidence that Mr. Freeman was or would have been asked to give a specific reason for his requests for time off. The evidence does not reasonably support an inference that Mr. Freeman would not have been given time off as he was but for a belief that he would use the time to support the termination application at the Scarborough store. However aware many of them may have been of Mr. Freeman's spending time watching signature collection or delivering documents, few of the employees who signed the petition, if any, would have been aware of the number or identity of all the occasions on which it had been necessary for him to take time off work, or of the nature or timing of the arrangements he made to take that time off. They would only know he was away from work at a time at which others were working. Again, in these workplaces that fact would not have created an objectively reasonable concern about management involvement in or support for the termination applications.

28. In their application to the circumstances of the applications at this store, we need add nothing to our earlier general comments about the wage increase at unorganized stores. We found nothing incredible about the testimony of Val McKean. The matters observed by Sandy White and the other union witnesses do not strike us as so out of the ordinary course of work related activities of the employees they had under observation as to support a reasonable inference, either by employees at the time or by us now, that management was involved in or was supporting the termination applications. There is no suggestion that the applicants failed to discharge the basis onus of adducing first-hand testimony about the origination and circulation of the petitions on which they rely and the circumstances in which each of the signatures thereon was obtained. Having weighed all of the parties' evidence and argument and considered particularly the cumulative effect of the five factors referred to in paragraph 19, with respect to each of the two subject bargaining units at the Scarborough store we find on the balance of probabilities that not less than 45 per cent of the persons employed in the unit on the application date had voluntarily signified as of the assessment date that they no longer wish to be represented by the respondent trade union.

Yonge-Eglinton Centre Store

29. We heard evidence about activities at the Yonge-Eglinton Centre store in connection with petition and counterpetition documents signed by employees in the full-time sales unit and petition documents signed by employees in the part-time sales unit. Although only the application with respect to the part-time sales unit is dealt with in this decision, all of the evidence in relation to activities at that store has been considered in determining whether the petitions in support of that application are voluntary.

30. The respondent relies on the following four factors as establishing that petition documents signed by part-time sales employees at the Eaton's store at the Yonge-Eglinton Centre are not voluntary:

- 1) Alex Nigro, the person primarily responsible for the origination and circulation of the petitions filed in support of both applications, was a section head.

- 2) Certain evidence was not introduced with respect to the solicitation of signatures.
- 3) The wage increase in unorganized stores and misrepresentations made about the wage increase by a petition supporter.
- 4) Certain comments made by the store manager to a full-time employee.

31. Alex Nigro collected all the petition signatures obtained at the Yonge-Eglinton store. Employees came to him outside the store as a result of contacts he and other petition supporters made in the store. There were three other employees in particular who sought out employees interested in supporting a termination application and arranged times and places at which they would meet Mr. Nigro to sign the petition. One of the three was Glenn Wood. Four employees called as witnesses by the union testified that Mr. Wood approached them during working hours to find out if they wanted to sign. None suggested these approaches had been made in the presence of management. Two said Mr. Wood's "pitch" was that they could save \$200.00 in dues. One was not asked what Mr. Wood's pitch had been. The fourth, Michelle Holland, said Wood told her (at a time when the applications with respect to the other stores had been filed with the Board) that theirs was the only store that still had the union, that the other stores were decertified, that as of November the stores without a union had received a raise and that employees in stores that got rid of the union would be receiving a raise retroactive to November.

32. A couple of weeks before she was approached about signing the petition, Ms. Holland had a conversation with the store manager, Mr. Patterson, about her financial situation and the possibility of a change of work hours or a raise. Mr. Patterson made no commitment on either matter. At the end of the conversation, Mr. Patterson said "you're with us all the way, aren't you, Michelle?" When she said yes, he said "that's all I wanted to know, goodnight." Ms. Holland says she later concluded that he must have been referring to the union, asking whether she would work during a strike, but that this did not influence her decisions about signing the petition and, later, the counterpetition.

33. This incident and the language used by Mr. Patterson have to be placed in context. Ms. Holland was having family problems which need not be particularized here. These problems were known to others in the store, and had been the subject of expressions of concern. Her problems resulted in financial difficulties and persistent difficulties in getting to work on time. Earlier on the day of the impugned conversation, she had had a discussion with fellow employees in the staff room beside the office about her financial problems and her desire to be scheduled on steady day shifts so she could take on a part-time job as well. She acknowledges that Mr. Patterson might have overheard that conversation. A couple of weeks earlier, she had approached Mr. Patterson about the wage she was being paid, asking why she was not being paid the higher rate being paid to a particular fellow employee. At some point around the time of the incident she also had a conversation with Mr. Patterson about her relationship with her sales manager, whom she thought was "nosey" about her family problems. He expressed concerns about her punctuality, was sympathetic about her problems and said he would speak to her sales manager. As a result, the sales manager apologized to Ms. Holland. A couple of weeks later, Mr. Patterson saw Ms. Holland was upset about something and invited her into his office. She told him she was having problems with her section head and planned to quit. She had arranged another job. He told her she was a valuable employee, and asked her if she really wanted to leave. When she said no, he arranged her transfer to another section, one she told him she had been happy in when she had worked there before. She thought his expressions of concern during this meeting were genuine. The precise question he had asked her was "would you be happy to continue to be part of the Eaton's team?"

Ms. Holland confirms that Mr. Patterson used phrases like that all the time: he regularly spoke in terms of the employees being on a “team” working to sell and earn money for Eaton’s.

34. We are asked to draw a negative inference from the fact that Mr. Patterson was not called as a witness. The inference we draw is that his description of the incident and the context in which it occurred would not have been so much more favourable than Ms. Holland’s to either of the other parties’ positions as to justify the enlargement and potential delay of these proceedings by introducing his version. When viewed objectively in the context established by Ms. Holland’s own testimony, the remark in question is more consistent with concern about Mr. Holland’s commitment to continued employment at Eaton’s than it is with a desire to influence her decision about signing a petition about which she did not learn for some time afterwards. This is particularly so in the complete absence of any other evidence consistent with an attempt by Mr. Patterson or any other member of this store’s management to influence any employee with respect to the petition.

35. On the basis of the evidence before us, we are not persuaded that employees at this store would have perceived Alex Nigro to acting as the agent of management in soliciting signatures directly or through others, nor that a perception of management involvement would have arisen from the fact that he and they spoke to employees about the petition during working hours. As for Mr. Wood’s misrepresentations to Ms. Holland, the evidence does not suggest that they were a regular feature of his discussions with employees. Even if they were, the fact that he would not have been perceived as making them on behalf of management puts them in the same category as any misrepresentation of fact made by a rank and file employee on either side during a representation contest. Except when it impairs the very ability of employees to evaluate or investigate the positions of the parties to that contest, the Board is generally unconcerned with the accuracy of the contest propaganda of rank and file employees when assessing whether applications for union membership, petitions or ballots represent the voluntary wishes of the employees who signed or marked them: see, for example, *Leon’s Furniture Limited*, [1982] OLRB Rep. Mar. 404; *Indusmin Ltd.*, [1982] OLRB Rep. Nov. 1641; *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19; and *Cara Operations Limited*, [1985] OLRB Rep. Feb. 222.

36. Finally, we do not agree that the applicant’s evidence failed to satisfy the basic evidentiary onus which the Board’s practice casts on applicants for termination of bargaining rights. We do not accept counsel’s submission that when the person who witnesses a signature is not the person who solicits it, the latter must be called as well. The burden of persuasion may require than an applicant do that when the evidence develops in a particular way, but the initial obligation to adduce evidence does not. While Mr. Nigro was more vague than one would usually expect about some of the dates on which signatures were obtained, we accept the explanation that this is the combined effect of the passage of time and the inadvertent loss of the notes of those matters which Mr. Nigro made during the time he was collecting signatures. Having weighed all of the parties’ evidence and argument and considered particularly the cumulative effect of the four factors referred to in paragraph 30, we find on the balance of probabilities that not less than 45 per cent of the persons employed in the subject unit on the application date had voluntarily signified as of the assessment date that they no longer wish to be represented by the respondent trade union.

Shoppers World Store

37. The respondent relies on the following four factors as establishing that petition documents signed by part-time sales employees at the Eaton’s store at Shopper’s World are not voluntary:

- 1) Most of the persons primarily responsible for the origination and circula-

tion of the petitions filed in support of both applications were section heads.

- 2) A sales manager in the Fashion department is the best friend of one of those persons: Yvonne Gunnis.
- 3) The wage increase in unorganized stores.
- 4) Records produced by the employer show that Yvonne Gunnis worked for seven and a half hours on February 26th, one of the dates on which she testified she had collected signatures.

38. Yvonne Gunnis and four others were involved in collecting signatures on the petition documents in these applications. She and one of those others had sought legal advice in 1985 about trying to get a vote on the contract the union negotiated. The other three joined with them as a result of conversations over coffee. Ms. Gunnis made the first contact with their counsel in this matter; she and three of the four went to the February 9th meeting at his office to pick up petition documents. She was the witness to 23 of the 85 petition signatures. Anita Sayers, her best friend, was promoted to sales manager in training in the late summer or early fall of 1985. It is not clear when the "in training" qualification ended, but it appears it had by February 1986. Ms. Gunnis has lunch with Ms. Sayers almost every day. Their friendship is a matter of common knowledge. Other managers do have lunch with bargaining unit employees, but no other pairing is as frequent. There is no suggestion that Ms. Gunnis traded on this relationship when discussing the petition with any potential signatory.

39. Ms. Gunnis testified, and we believe, that she did not discuss anything about these applications with Ms. Sayers. Still, the question is whether employees considering the matter objectively would have thought it probable that this friendship would be a means by which Eaton's management would actually learn who did and did not sign the petitions. The mere fact of a friendship or other relationship between an applicant and a member of management is not determinative of an issue of this sort. When the Board has found voluntariness affected there generally has been some other factor in addition to the relationship itself. As the Board observed in *Labatt's Ontario Breweries*, [1985] OLRB Rep. Mar. 433 at paragraph 13:

A petitioner's personal relationship with a member of management is a factor to be considered in assessing what would have been in the minds of those who signed the petition. The existence of such a relationship, however, does not lead inexorably to the conclusion that the petition does not reflect the voluntary expression of the wishes of those who signed. *International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690 involved an application for termination brought by an employee who was the wife of one of the co-owners of the tavern at which she and the other affected employees were employed. The Board found that the petition was voluntary. In *Ottawa Commercial Realities Limited*, [1983] OLRB Rep. Nov. 1877, the Board found that a petition in support of a termination application was voluntary, even though the applicant was the sister of the immediate supervisor of the employees affected. A petition circulated by the son of the owner of the employer company was rejected in *Jean Marc Joannis*, [1983] OLRB Rep. Jan. 92, when the Board concluded that the son would be regarded by employees as an arm or agent of his father and, hence, a member of management. It was not without significance in that case that the owner's son, applicant on the application, had served as manager of the store when his father was absent and, it was found, had made references to his father's ownership and management of the business in the course of circulating the the petition.

See also *Domus Building Cleaning Co. Ltd.*, [1986] OLRB Rep. Mar. 319, and decisions cited therein at paragraph 16. We do not agree with counsel for the respondent that Sayers' prior involvement in circulating a petition against the union before her promotion out of the bargaining

unit would lead employees to regard Gunnis as acting as Sayers' agent in her opposition to the union thereafter.

40. During her testimony on July 21, 1986, about the circumstances in which she obtained signatures on petition documents, Ms. Gunnis had some difficulty putting precise dates to the occasions in February and March on which she had collected signatures. With respect to eight of the signatures, at one point she said she collected them on February 22nd and at another that she collected them on the 26th. In either event, her recollection of the day on which the signatures were obtained was that she had the day off and came into the mall at about 11:00 a.m. It was not put to her in cross-examination that her evidence was inconsistent with employer records of the days and hours for which she was paid. The union could have had production of the relevant records at any time in the period of nearly three months between the first hearing date and the date Ms. Gunnis testified, but it could not have known what those records said before the Board's proceedings began. The later point is as significant as the first, because it is not suggested that any employee knew or believed, at the time signatures were being collected, that Ms. Gunnis was collecting those signatures during her working hours. The inconsistency (if there is one) does not support a finding that employees thought management was actively supporting the petition. Furthermore, it is not entirely apparent that there was a clear inconsistency which called for explanation in reply. Ms. Gunnis was not categorical about her having collected signatures on February 26th and she was not invited to be. On the other hand, she was firm that the day on which she collected the signatures in question had been one of her days off.

41. Again, our general comments about the involvement of section heads and the wage increase in unorganized stores apply to the applications at the Shoppers' World store. Having weighed all of the parties' evidence and argument and considered particularly the cumulative effect of the four factors referred to in paragraph 37, in respect of each of the two subject bargaining units at that store we find, on the balance of probabilities, that not less than 45 per cent of the persons employed in the unit on the application date had voluntarily signified as of the assessment date that they no longer wish to be represented by the respondent trade union.

St. Catharines Store

42. The respondent relies on three factors in its opposition to the applications with respect to the St. Catharines store:

- 1) The failure of the applicants to lead evidence about how the signed petition documents got from them to the Board.
- 2) A statement made to union supporters by Ross Campbell, a part-time employee, that he signed the petition after Irene Caddis, a managerial employee, asked if he wanted to sign and told him that someone would meet him in the mall outside the store if he did.
- 3) The wage increase given to employees at unorganized stores.

43. Chris Aqui began the process which led to these two applications. He had been planning to do so since the union signed its contracts with Eaton's. He retained his present counsel before he began collecting signatures. He and Denise Pigeau collected the signatures on the petition documents filed with the Board. They both testified with respect to the circumstances in which each signature was obtained. They accounted for the custody of the documents up to the time the fully signed documents were in Mr. Aqui's hands. Mr. Aqui was not asked how the documents got from his hands to the Board. Counsel for the respondent chose not to cross-examine either of the

applicants at all, leaving unchallenged both their credibility and their categorical assertions that there had been no management involvement in the origination or circulation of the petition documents or discussion with any member of management about it.

44. The Board has never rejected a petition merely because it lacked first-hand evidence of the delivery of the petition to the Board: *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289 at paragraph 18. In this case, the petition documents and application for termination arrived at the Board under cover of a letter from the applicant's counsel. The Board does not ordinarily require evidence of the handling of petition documents after they reach the hands of apparently independent counsel acting for the applicant: see *Labatt's Ontario Breweries*, *supra*, at paragraphs 9 and 10. Other deficiencies in the evidence relating to custody have not been fatal when they relate to a period subsequent to the obtaining of all the signatures on which the Board is relying and there is no suggestion that the petition may have at some point fallen into the hands of management: *Weston Bakeries Limited*, [1979] OLRB Rep. December 1309. There is no such suggestion here. Indeed, there is no suggestion that the petitions were in any hands other than Mr. Aqui's from the time all signatures were obtained to the time they reached the office of the applicants' counsel. In the circumstances, and particularly when the applicants' denials of involvement of or discussion with management were not challenged in cross-examination, we are prepared to act on the reasonable assumption that Mr. Aqui delivered the petition documents directly to his counsel.

45. In March 1986, Julie Rogozynski was a community college student working part-time in the restaurant at the St. Catharines Eaton's store. She was a union supporter, and had been asked to find out what she could about petition related activity. She knew Ross Campbell, who was employed in the restaurant as a dishwasher. One day in early April they had a conversation in the kitchen. Julie asked Ross whether he had signed the petition. He said yes. In an earlier conversation he had said he did not care which way it (the question of union representation) went, because he was planning to go back to school. Because of this earlier comment, Julie asked Ross why he had signed. He said "somebody asked me to." Julie gave him a "funny" look, because it was well known that his mother, who also worked in the restaurant, had been strongly anti-union ever since the strike. He responded to this look by saying that it was not his mother. Julie asked "who." Ross said "Irene did." Irene Caddis is the restaurant's Food Services Manager, a position at the first level of management. Julie then arranged to speak with Ross further about the union after work, and got in touch with Diane Jodoin, a shop steward. Diane joined Julie and Ross after work. The conversation with Ross about the union and the possibility of his signing a counterpetition was brought back to the circumstances of his signing the petition. He then told them that Irene Caddis has asked him into her office, asked him if he wished to sign and said that if he did, she would tell him when and where to go to sign it.

46. Ross Campbell was summonsed as a witness by the union. He could not remember whether he said what Julie Rogozynski and Diane Jodoin report he said, but admitted it is possible he did. Nevertheless, he denied that Irene Caddis did in fact speak to him about signing the petition. He said he was spoken to about the petition by whoever was "in charge" of the restaurant on the day he signed. When he spoke to Julie Rogozynski and Diane Jodoin nearly a month after signing, he says he may have thought the person in charge that night was Irene Caddis. After having made inquiries about who was in charge that night, however, he says the person who spoke to him was Sharon Corey, the head cook, who assumes responsibility for keeping a flow in the restaurant when Ms. Caddis is not there. Ms. Corey is a member of the full-time bargaining unit and her position is comparable to that of a section head.

47. Counsel for the respondent argues that we can admit the union witnesses' hearsay evidence of Campbell's prior unsworn statement as evidence of the truth of its contents, and not just

on the question of his credibility, because he was available to the other parties for cross-examination, citing the decision of the Ontario Division Court in *Re United Glass & Ceramic Workers of North America et al. and Pilkington Brothers (Canada) Ltd., et al.* (1978), 21 O.R. (2d) 241, 89 D.L.R. (3d) 737. We note that in so holding, the court observed (at p. 243 O.R., 739 D.L.R.) that

Whether the statement is accepted for that purpose depends on the decision of the tribunal as to the credibility of the declarant and the credibility and weight to be attached to the contents of the statement on all the evidence in the case.

Unlike the circumstances of the arbitration decision under review in that case, in this case there is no evidence of the truth of its contents other than the statement itself. While this should not be determinative in itself, it puts a premium on the question of Campbell's credibility and the consistency of the statement with surrounding circumstances. Having seen and heard Mr. Campbell give evidence, we would be loath to deny the applicants the representation votes to which they are otherwise entitled because of statements he made in response to a "funny" look which he correctly interpreted as suggesting that he had signed the petition because his mother asked him to. There is no other evidence to suggest that Caddis or any other member of management was involved in promoting the petition and, on the usual rules governing the conduct of adversarial litigation, the failure of counsel for the respondent to cross-examine the respondents should be an end to any question of actual management involvement. As for the question of perceived management involvement arising from the statement Campbell made, there is no suggestion or likelihood that it was repeated to anyone who might have been influenced to sign the petition as a result.

48. Again, our general comments about the effect of the wage increase in unorganized stores apply to the applications at the St. Catharines store. Having weighed all the parties' evidence and argument and considered particularly the three factors referred to in paragraph 42, in respect of each of the two subject bargaining units at that store we find, on the balance of probabilities, that not less than 45 per cent of the persons employed in the unit on the application date had voluntarily signified as of the assessment date that they no longer wish to be represented by the respondent trade union.

IV

49. In Board File 3132-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees of the T. Eaton Company Limited at its retail stores in Brampton, Ontario, located at the Bramalea City Centre, 20 City Centre, Brampton, Ontario, L6T 3R8, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods, students employed on a co-operative programme with a school, college or university and employees hired for a specific term to meet the seasonal fluctuations of the business and for a period of time not to exceed fifteen (15) weeks in any one year.

Employees of the T. Eaton Company Limited headquartered or working out

of other locations who work in the Bramalea Civic Centre in Brampton are not within the bargaining unit.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

50. In Board File No. 3130-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees of the T. Eaton Company Limited at its retail stores in Brampton, Ontario, located at the Bramalea City Centre, 20 City Centre, Brampton, Ontario L6T 3R8, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse and students employed on a co-operative programme with a school, college or university.

Employees of the T. Eaton Company Limited headquartered or working out of other locations who work in the Bramalea Civic Centre in Brampton are not within the bargaining unit.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

51. In Board File No. 3131-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all office and clerical employees of the T. Eaton Company Limited at its retail stores in Brampton, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods, save and except managers, those above the rank of manager, employees of Eaton Travel Ltd., personnel staff, secretary to the store manager, medical services nurse and students employed on a co-operative programme with a school, college or university.

Employees of T. Eaton Company Limited headquartered or working out of other locations who work in the Bramalea Civic Centre in Brampton are not within the bargaining unit.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

52. In Board File No. 3127-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees of the T. Eaton Company Limited at its retail store, located in the Scarborough Town Centre, 300 Borough Drive, Scarborough, Ontario M1P 4P5, save and except sales managers, merchandise presentation managers, food services managers, operating services managers, maintenance managers, and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager, operating services manager, maintenance manager or foreman, employees of Eaton Travel Ltd., employees of Eaton Bay Financial Services, office and clerical staff, management trainees, personnel staff, security staff, medical services nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods, students employed on a co-operative program with a school, college or university and employees hired for a specific term to meet the seasonal fluctuations of the business and for a period of time not to exceed fifteen (15) consecutive weeks in any one year.

Employees of the T. Eaton Company Limited headquartered working out of other locations who work in the Scarborough Town Centre, are not within the bargaining unit.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

53. In Board File No. 3133-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees of the T. Eaton Company Limited at its retail store located in the Scarborough Town Centre, 300 Borough Drive, Scarborough, Ontario M1P 4P5, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food services managers, operating services managers, maintenance managers, and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager, operating services manager, maintenance manager or foreman, employees of Eaton Travel Ltd., employees of Eaton Bay Financial Services, office and clerical staff, management trainees, personnel staff, security staff, medical services nurse and students employed on a co-operative program with a school, college or university.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

54. In Board File No. 3128-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees of the T. Eaton Company Limited at its retail store located at

Shoppers' World, 3003 Danforth Avenue, Metropolitan Toronto, save and except sales managers, merchandise presentation managers, food service managers and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods, students employed on a co-operative programme with a school, college or university and employees hired for a specific term to meet the seasonal fluctuations of the business and for a period of time not to exceed fifteen (15) consecutive weeks in any one year.

Employees of the T. Eaton Company Limited headquartered or working out of other locations who work at 3003 Danforth Avenue, Metropolitan Toronto, are not within the bargaining unit.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

55. In Board File No. 3129-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees of the T. Eaton Company Limited at its retail store located at Shoppers' World, 3003 Danforth Avenue, Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food service managers and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager or foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse and students employed on a co-operative programme with a school, college or university.

Employees of T. Eaton Limited headquartered or working out of other locations who work at Shoppers' World, 3003 Danforth Avenue, Metropolitan Toronto, are not within the bargaining unit.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

56. In Board File No. 3186-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees at its retail stores in St. Catharines, Ontario, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd. management trainees, security staff, medical

services nurses, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods, students employed on a co-operative programme with a school, college or university and employees hired for a specific term to meet the seasonal fluctuations of the business for a period of time not to exceed fifteen (15) weeks in any one year.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

57. In Board File No. 3187-85-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees at its retail stores in St. Catharines, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation periods, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd., management trainees, security staff, medical services nurse and students employed on a co-operative programme with a school, college or university.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

58. In Board File No. 0277-86-R we direct that a representation vote be conducted among employees in the following bargaining unit:

all employees of the T. Eaton Company Limited at its retail store located at 2300 Yonge Street, Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food service managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager or foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical service nurse and students employed on a co-operative programme with a school, college or university.

Employees of the T. Eaton Company Limited headquarters or working out of other locations who work at 2300 Yonge Street, Metropolitan Toronto, are not within the bargaining unit.

All persons employed in this unit on the date of this decision who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the respondent in their employment relations with the intervener.

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59. We direct that the parties meet with a Labour Relations Officer to be designated by the Registrar at such date(s), time(s) and place(s) as the Labour Relations Officer may appoint, in order to make arrangements for these votes. In that connection, the intervener is directed to forthwith prepare lists of the names of persons employed in each of the aforesaid bargaining units as of the date of this decision and to deliver copies of each list to the Registrar and to counsel for the respondent and counsel for the affected applicant.

60. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER R. R. MONTAGUE;

1. I dissent from the decision of the majority.

2. The majority examines the various attacks on the voluntariness of the petitions and decides in each case that a reasonable employee will not perceive the petition to be either management supported or that the management will become aware of who signed it. As I will explain below, in the particular circumstances of this case, I would have reached a different conclusion.

3. Before dealing with the specific evidence I make two general observations. The *first* is, that in dealing with a union representation issue, it is reasonable to assume that employees would generally wish to be seen as being supportive of their employer rather than as being against the employer. The Board has repeatedly recognized this as a reality in the workplace. Thus, for example, in *Radio Shack*, [1978] OLRB Rep. Nov. 1043 at para. 24, the Board quoted from the *Pigott Motors* case, [1963] CLLC ¶16,264, as follows:

In view of the responsive nature of his relationship with his employer and his natural desire to want to appear to identify himself with the interests and wishes of his employer, *an employee is obviously peculiarly vulnerable to influences, obvious or devious* which may operate or impair or destroy the free exercise of his rights under the Act.

[emphasis added]

4. My *second* observation is this: the Board has in numerous cases recognized that due to the nature of the employment relationship, the exercise of employee free wishes regarding representation may be impaired not only by obvious employer influences but also by the overall environment created by the employer. Thus in *Radio Shack* (supra) at 1049, the Board said:

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that *it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it*. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

[emphasis added]

5. In my view, these two observations have particular application to the termination applications before us. Unlike the majority, I believe that the employment relationship at Eaton's is no different than that at any other workplace in regard to employee perception. So we can reasonably

assume that employees at the Eaton's stores here would wish to be seen as being pro-management rather than pro-union.

6. How the work environment affected Eaton's employees is even more significant here. In order to assess this it is necessary to review the brief history of collective bargaining between the respondent union and the employer, Eaton's. The union's organizing drive at Eaton's stores in 1984 was highly publicized. During this drive, Eaton's made it very clear that it was determined to go a long way to prevent unionization of its stores. Eaton's imposed a prohibition on union activity, which the Board found to be unlawful (see [1985] OLRB Rep. June 941). It refused to grant its employees at the unionized stores anything more than what employees at its non-union stores were making. Although this bargaining posture was found by the Board's majority decision to be not bargaining in bad faith ([1985] OLRB Rep. Mar. 491), the message to the unionized employees was loud and clear: "you are better off without a union". The company persisted with its decision of not granting unionized employees any terms of employment better than that given to non-union employees and it was ready to take a lengthy strike to support its position. This was averted only as a result of the union being forced to execute an inferior contract without employee ratification (see [1985] OLRB Rep. Aug. 1309). In my view, this history of employer conduct laid the groundwork for the filing of the present applications for termination and makes a big difference in how employees will perceive what goes on in the course of circulation of termination petitions.

7. Dealing with the evidence adduced at the hearing, one of the grounds commonly relied on by the union to argue that the petitions were not voluntary was the granting of a wage increase to the employer's non-union employees. In this regard, I refer to the following passages from the Board decision in *Irwin Toy Limited*, [1983] OLRB Rep. July 1064:

10. The only evidence before the Board on the comparability of the work forces and the work in both plants is that of union representative Alex Muselius. While he has not visited the Hannah plant he has some general familiarity with the respondent's operations through extended contact with it since the certification of the North Queen plant. His evidence is that the plants are comparable in their product lines and in the skill and ability of their respective work forces. The respondent called no evidence to explain the historical basis, if any exists, for the wage and benefits differential between its two plants. Nor was any witness called to explain the rationale for its transfer of Hannah employees to North Queen in disregard of the collective agreement wage rates or to explain the rationale for the company's outstanding offer in the next agreement of lower wages for unionized employees than are now being paid to its non-union employees at Hanna.

11. *The different treatment of employees may be explained on the basis of legitimate economic reasons. Where, however, no such reasons are apparent and, as in the instant case, no evidence is forthcoming to explain the preferential treatment of one group of employees over another, the Board must look with great care to the whole of the evidence. That is particularly true in these circumstances where, given the bargaining history, the parties are in a situation for all practical purposes likened to a first agreement negotiation. Absent any explanation, parties may be presumed to intend the consequences of their actions. While in this case the burden of proof generally referred to as the 'legal burden', is at all times on the union, the adducing in evidence of facts which would support adverse inferences against the employer to come forward with some explanation for its actions.*

12. *There is much in the evidence before the Board to substantiate the submission of the union that the respondent has, from the time of the union's certification and its strike, deliberately created the conditions for an early termination of the union's bargaining rights.*

[emphasis added]

The principles set out in that case and particularly the parts emphasized by me, apply equally to this case.

8. The majority has reviewed the evidence in detail and I will not repeat it. However, I draw different conclusions from some of that evidence. The evidence damaging to the various petitions included the following:

- Section Heads were actively involved in originating and circulating each of the petitions;
- a Section Head told an employee that if the latter cut up her union card, she would give her more work hours;
- one petition was left at the home of a Section Head, available for inspection by anyone who chose to do so;
- employees receiving time off and attending to circulation of the petition, and employer tolerance of time-offs and late reporting to work by persons engaged in circulating the petition;
- a management member saying to an employee "you are with us all the way, aren't you, Michelle?", which was understood by the employee to be a reference to the union;
- a Sales Manager was the best friend of an employee who collected signatures on a petition;
- employer records show that an employee (Gunnis) was at work on a date on which she testified she was circulating a petition.

9. In relation to each allegation the majority decides that on a balance of probabilities a reasonable employee would not perceive the petitions to be management supported. In other words in each case, the majority draws a conclusion in favour of the petition being voluntary.

10. While such conclusions may have been justifiable in other termination cases, in my view in this particular case at least, such conclusions go against reason. Given the environment the employer had created and the employees' knowledge that the employer was determined to operate on a non-union basis, any reasonable employee is likely to be suspicious of employer involvement given the slightest reason to do so. When faced with a situation which may have a "taint" indication or a "non-taint" indication, an employee is likely to decide in favour of the petition being tainted. For example, take the situation with the petitioner whose best friend was the Sales Manager. The Board has said that it "has indicated in a number of cases that a petitioner's personal relationship with a member of management and the awareness of this relationship by employees in the bargaining unit are factors to be considered in assessing whether or not the signatures expressed the true wishes of the employees who signed", (*Domus Building Cleaning Co. Ltd.*, [1986] OLRB Rep. Mar. 319, where the Board rejected the termination petition). I find it incredible that this employee testified that although she had lunch with the Sales Manager on a daily basis, she never discussed the petition with her. Whether she actually did so or not, my concern is with employee perception. Even though in another case the Board may have concluded that a reasonable employee will not perceive disclosure, that cannot be so here. Knowing very well the employer's desire and determination to operate non-union, any reasonable employee is bound to conclude that the Sales Manager will use her friendship to inquire and find out about who signed the petition. Given what had gone on, that is a reasonable and natural perception.

11. On a similar basis, I would have concluded that the other situations listed in paragraph

9 above would have led any reasonable employee to believe that each of the petitions in these applications was supported by management or that management is likely to find out who signed it. In view of all of the circumstances surrounding this case, I would have found that none of the petitions filed were voluntary. Consequently, I would have dismissed each of the applications.

12. Having set out my disposition of the case I wish to make the following observation. This Province has in recent years experienced many highly publicized legal strikes for a first contract such as *Fleck*, *Blue Cross*, *Radio Shack* and *Irwin Toy* to name but a few with the culminating case being the Eaton's strike. These lengthy strikes made the Legislators turn their minds to amending the *Labour Relations Act* to include what we now know as *Bill 65* (now section 40a), first contract legislation will prevent such tragedies to workers in the future. The introduction of this legislation conforms and enhances the preamble of the Ontario *Labour Relations Act* which states that "it is in the public interest of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as freely designated representatives of employees".

0276-86-R Alex Nigro, Applicant, v. Retail, Wholesale and Department Store Union, Respondent, v. T. Eaton Company Limited, Intervener

Petition - Termination - Counter-petition reducing support for termination application below 45 percent - Applicant challenging Board's jurisdiction to give effect to counter-petition in deciding whether to order a vote in a termination application - Purposive interpretation of s.57(3) adopted - Termination application dismissed

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *Stewart D. Saxe*, *Cheryl Elliot*, *David Cote* and *Alex Nigro* for the applicant; *Paul Cavalluzzo* and *Bernie Hanson* for the respondent; *H. A. Beresford*, *R. A. Hubert* and *Barry G. Puckett* for the intervener.

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER R. R. MONTAGUE; January 23, 1987

1. This is an application under section 57 of the *Labour Relations Act* ("the Act") for a declaration that the respondent no longer represents a unit of full-time sales people employed by the intervener at its store at 2300 Yonge Street in Toronto.

2. Subsection (3) of section 57 of the Act provides that:

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

Thirty persons were employed in the subject bargaining unit on April 24, 1986, the date this application was filed. May 8, 1986, was fixed as the terminal date for this application and, in accordance with the Board's usual practice, that is the date (hereafter referred to as "the assessment date") which we determine under clause 103(2)(j) of the Act to be the time as of which evidence of signification by employees that they no longer wish to be represented by the respondent trade union must be presented to the Board in this application.

3. Prior to the assessment date, 15 of the aforesaid 30 employees had signified in writing that they no longer wished to be represented by the respondent. In accordance with common usage, documents by which employees so signify will be referred to here as "petitions." After having so signified, and also before the assessment date, two of those 15 employees signified in writing that they wished the respondent to continue as bargaining agent for employees at the subject location. Again in accordance with common usage, documents by which employees so signify will be referred to here as "counterpetitions." Counsel for the applicant acknowledges that these two affirmations of support were voluntary expressions of the wishes of the employees who signed them.

4. It has been the Board's long-standing practice in applications of this kind to consider only the last voluntary signification of wishes made by an employee on or before the assessment date when making the assessment required by subsection 57(3). An employee who signs a petition and later voluntarily signs a counterpetition on or before the assessment date is not treated as having signified "at such time as is determined under clause 103(2)(j)" that she no longer wished to be represented by the trade union identified in the petition and counterpetition. The consequence of assessing this application in that manner is dismissal, since the 13 employees whose signatures on the petitions represent the last signification of their wishes as of the assessment date constitute less than 45 percent of the 30 employees who were in the bargaining unit on the date the application was filed.

5. Counsel for the applicant submits that the Board has no jurisdiction to give any effect to a counterpetition in deciding whether to order a vote in a termination application. He says the only question the Board must address under subsection 57(3) is whether not less than 45 percent of employees in the unit have voluntarily signed a petition at some time before the assessment date. If they have, he argues, it does not matter whether any of them has subsequently signed something else. He acknowledges that this very argument was made to and rejected by the Board in *Browning-Ferris Industries*, [1982] OLRB Rep. June 816, where the Board concluded that:

14. As with the certification situation, on an application for termination, where the Board is also required to ascertain employee wishes, the counter petition expressing reaffirmed support for the trade union is as relevant as the petition against the union. In section 57(3) of the Act the Board is directed to "ascertain ... whether not less than 45 per cent of the employees ... have voluntarily signified in writing at [the terminal date] that they no longer wish to be represented by the trade union ...". The Board concludes that this section requires the Board to determine the percentage of employees who at the terminal date no longer wish to be represented by the union. The Board further concludes that when it is in receipt of a document, by the terminal date, purporting to express the wishes of employees to continue to be represented by the trade union, it is incumbent on the Board to give it full consideration in determining under section 57(3) "whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at [the terminal date] that they no longer wish to be represented by the trade union ..." (emphasis added). A numerically relevant counter-petition received by the Board by the terminal date purporting to express the wishes of employees on the question of union representation cannot be ignored by the Board as urged in this case by the applicant and employer. It is evidence which must be considered by the Board to determine the state of employee wishes as at the terminal date.

Counsel invites us to conclude that that decision and others to the same effect are wrong.

6. The interpretation reaffirmed in *Browning-Ferris Industries, supra*, has been applied by the Board for a number of years: see, for example, *E.S. & A. Robinson (Canada) Limited*, [1967] OLRB Rep. July 363; *Gorman Eckert and Company Limited*, [1969] OLRB Rep. Apr. 81 (reconsideration denied, [1969] OLRB Rep. June 438); *Redpath Sugars Ltd.*, [1974] OLRB Rep. July 502; *Mitten Industries Galt Ltd.*, [1976] OLRB Rep. Mar. 76; *VS Services*, [1978] OLRB Rep. Mar. 323; *The Sudbury Star*, [1978] OLRB Rep. Sept. 873; *Browning-Ferris Industries, supra*; *Canadian Pacific Hotels Limited*, [1982] OLRB Rep. June 824; *Buntin Reid Paper*, [1983] OLRB Rep. Apr. 487; and, *Canadian Pacific Hotels Limited*, [1985] OLRB Rep. Oct. 1445. The alternate interpretation contended for by counsel has been put before the Board more than once: for an early example, see the dissent of Board Member Irwin in *Gorman Eckert and Company Limited, supra*. We recognize that this panel is not bound by law to follow the Board's previous decisions on this or any other point. While the age, frequency and consistency of the Board's past decisions on this particular point do not guarantee the correctness of their interpretation of the words of subsection 57(3), those factors should lead us to be cautious about rejecting that interpretation. That is particularly so when what is at stake is one of the well established rules by which representation contests are judged, since there will be considerable reliance on those rules by the contending forces in any such contest, both in their actions during their respective campaigns and, later, in the way they frame their issues and present their evidence with respect to those campaigns in proceedings before the Board.

7. At first blush, the alternate interpretation contended for by counsel for the applicant is merely a literal reading of the words of subsection 57(3). When the interpretation is subjected to closer examination, however, the applicant concedes the necessity of engaging in a purposive, rather than literal, interpretation of at least some of the words of that subsection. For example, a literal interpretation of the phrase "at such time as is determined under clause 103(2)(j)" might require that all signatures be placed on the supporting petition on the same day or even, perhaps, at the same instant, if the focus of the subsection's attention is thought to be on whether the employee has ever signified a particular wish, rather than the state of the employee's wishes at a particular time. Counsel seeks to avoid that consequence of relentless literalism by having us read "at such time" as "at or before such time." Counsel further refined the "at or before such time" substitution when faced with the proposition that this would require the Board to act on a petition signed months or years before the application date. Counsel did not argue that this was the intent of the legislature; he said he expected that the Board would deal with this problem by putting a limit on the period of time during which a petition signature would be regarded as effective. Presumably, the Board would find this power by further purposive analysis of the subsection. As a result of the application of common sense about labour relations, what begins as a strict literal analysis ends by implying into subsection 57(3) a great deal more than does the Board's usual interpretation, which treats "at such time ..." as meaning "as at such time ...", which is consistent with the language of clause 103(2)(j) itself.

8. Another problem with the applicant's interpretation of subsection 57(3) is this: if the legislature had thought that the question to be determined under that subsection could only be affected by documents gathered up and filed by the applicant, there would have no reason for it to have required that that question be determined as at a time to be set under clause 103(2)(j). The only reason for setting an assessment date which is different from the application date is to give those opposed to the application the opportunity, after receiving notice of the application, to bring into existence and file with the Board such documentary evidence of employee wishes as may contradict the documentary evidence of the applicant. If no such documentary evidence can affect the result, then there is no need to set a separate assessment date. If the applicant's documentation is

the only documentation that can affect the threshold question, as is the case in applications for certification under section 9 of the Act, then the sensible thing is to make the application date the date as of which the relevant threshold question is determined, which is what the legislature did in section 9. In applications under section 7, in which documentary evidence of employee opposition can influence the result, the legislature directs that the Board set an assessment date. In that context, the fact that the legislature calls for a separate assessment date in subsection 57(3) strongly suggests an expectation and intention that timely documentary evidence contradictory to that of the applicant be entertained. Counsel for the applicant was unable to explain the purpose a separate assessment date could have been intended by the legislature to serve if his submissions on the interpretation of subsection 57(3) were correct.

9. Counsel for the applicant observed that, on the Board's existing jurisprudence, opponents' documentary evidence of employees' desire for union representation can deprive applicants for termination of a representation vote to which they would be entitled if the Board only considered the applicants' documentary evidence, while no amount of similar evidence of employee wishes can deprive a trade union applicant for certification of the right to a representation vote if its membership evidence satisfies the numeric requirements of section 7 or 9, as the case may be. He described this difference in treatment of opponents' documentary evidence as inequitable, and invited us to remedy the inequity in our interpretation of subsection 57(3).

10. The suggestion that opponents' evidence of employee wishes ought to be equally efficacious in both certification and termination applications ignores important differences in the requirements which the Legislature has imposed on applicants in those different types of application. In order to be entitled to a representation vote in an application under section 7, or to have effect given under subsection 9(4) to a pre-hearing vote conducted under subsection 9(2), an applicant for certification is only required to demonstrate that a certain percentage of the employees in the unit on the application date were *members* as of a particular date (the assessment date on an application under section 7; the application date on an application under section 9). The documentary evidence required of an applicant for termination, on the other hand, must directly address employee wishes with respect to continued representation by the incumbent union as of the relevant date. Because of the nature of the Legislature's test for entitlement to a vote in certification cases, evidence in opposition (other than evidence of union wrongdoing) could only deprive an applicant for certification of a vote to which its own documentary evidence would otherwise entitle it if that evidence in opposition established that employees who appeared from the applicant's evidence to be members were not in fact members or had ceased to be members as of the relevant date. (It might be a matter of debate whether any documentary evidence could rebut the conclusion compelled by clause 1(1)(l) of the Act when the applicant's membership evidence establishes that an employee has applied for membership and paid at least one dollar as contemplated by that clause. It will be recalled that clause 1(1)(l) was added to the Act after the Supreme Court of Canada in *Metropolitan Life Insurance Company & International Union of Operating Engineers, Local 796, et al.*, [1970] S.C.R. 425, 11 D.L.R. (3d) 336, refused to countenance a broadly purposive interpretation by the Board of the word "members" in what is now section 7 of the Act.)

11. The Act does not require that an applicant for certification demonstrate that a sufficient number of its members in the bargaining unit actually wished to be represented by it in collective bargaining with their employer as of the relevant date. Evidence that one or more of them did not so wish as of that date does nothing to rebut the applicant's evidence that they are members. Such evidence cannot affect entitlement to a vote because it does not address the question put to the Board by the Legislature. Such evidence is only relevant in an application for certification under section 7 with respect to the exercise of the Board's discretion under subsection 7(2) to certify without a vote or order a representation vote: see *Unlimited Textures Company Limited*, [1984]

OLRB Rep. Jan. 13 at paragraphs 15 to 19. Unlike its requirement of an applicant for certification, the Legislature requires the applicant for termination to establish by documentary evidence that the wishes with respect to representation of a minimum number of employees in the unit were consistent, as of the relevant date, with the result sought. Opponents' documentary evidence of employee support for continued representation by the union does address the question on which entitlement to a vote hinges in a termination application and, so, can affect whether a vote is ordered. The difference in treatment which counsel describes as inequitable is a consequence of the express language of the Act. Whether or not that difference is inequitable is not a question which the Legislature has left for this Board to decide.

12. For these reasons and the reasons set out in the majority decision in *Browning-Ferris Industries, supra*, we are satisfied that the interpretation of subsection 57(3) which was reaffirmed in that decision is a reasonable one and ought to be applied.

13. Counsel for the applicant argued in the alternative that if the Board has the power to consider counter-petitions it also has the discretion to ignore them and order a vote in cases in which the total number of employee signatures on the petition or petitions is not less than 45 percent of the number of employees in the unit on the application date. He urged us to exercise that discretion in favour of the applicant in this case because 13 unrevoked petition signatures out of 30 employees is less than one full person short of the required 45 percent.

14. Unlike section 7, subsection 57(3) does not give the Board the discretion contended for or any other discretion. If the signatures on a timely counterpetition are voluntary, as counsel concedes in this case, and represent the last signification of wishes by the signers, as they do here, then those signatures must be taken into account by the Board in answering the question which it understands is posed by subsection 57(3). Only those petition signers who have not subsequently and voluntarily signed a timely counterpetition can be said to have signified as of the assessment date that they no longer wish to be represented by the respondent. If those persons do not constitute at least 45 percent of the employees in the subject bargaining unit at the time the application for termination was made, as subsection 57(3) requires, then the application must be dismissed. An application for certification under section 7 would also have to be dismissed if the applicant only established that 43.3% of employees in the unit were members at the relevant time. It is true that applicants for termination of the respondent's right to represent other units of Eaton's employees (in applications heard together with this one) have succeeded in persuading a majority of this panel that they have satisfied the requirements of subsection 57(3). With respect, however, we do not accept Board Member Wightman's view that those successes should relieve the applicant in this case of the need to establish the level of support necessary under section 57(3) in this unit, any more than the respondent could have been relieved of the requirements of section 7 in any one of its 1984 applications for certification with respect to these units as a result of its successes in others.

15. Accordingly, this application is dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. As in both *Browning-Ferris Industries*, [1982] OLRB Rep. June 816 and *Canadian Pacific Hotels Limited*, [1982] OLRB Rep. June 824, I must respectfully dissent from the majority decision to deny the applicants a vote to determine whether a majority of the employers at the Yonge-Eglinton store wish to continue to be represented by the respondent union.

2. In arriving at this conclusion I am impressed by the lack of symmetry between the sec-

tions of the *Labour Relations Act* dealing with the certification of trade unions in contrast to those dealing with the termination of bargaining rights.

3. In the case of a certification application the Board in its discretion, may grant outright certification of bargaining rights if the membership evidence is in excess of 55%.

4. In the case of an application for the termination of bargaining rights there is no comparable provision giving the Board discretionary authority to terminate bargaining rights should the application represent 56% of the employees or, indeed, even 100% of the unit. Thus the legislators have made it clear that the termination of bargaining rights is a decision of such significant import that *only* by means of a government supervised secret ballot vote should and shall such an issue be determined. In this respect at least the legislators seem clearly disposed to place more confidence in the secret ballot than in statements of desire (petitions) which necessarily are hearsay in nature, despite the intensity with which the circumstances surrounding the origination and circulation of petitions are examined by the Board and Counsel for the opposing party.

5. Membership evidence in support of an application for certification is also hearsay in nature. Unlike petition documents the Board hears no evidence as to the circumstances under which the membership evidence was obtained unless the employee in question has the temerity to complain in person or conveys information regarding an impropriety by the union to someone knowledgeable enough and disposed to file a complaint. I have never regarded "evidence" of the payment of one dollar, (which causes the Board to view the transaction as a form of contract) or the declaration by an official of the union (that he or she has investigated the organizing process and is satisfied that no improprieties have taken place) as counter-balancing the absence of direct evidence of the sort which emerges during the examination of petitioners.

6. Quality of membership evidence notwithstanding, the Act provides that the Board *may* certify outright if the evidence exceeds 55% but that the Board *shall* direct a representation vote if the level of evidence is between 45% and 55%. In the latter case the legislators have again opted for the secret ballot as the preferred means of determining the true wishes of a majority of the employees. Thus the scheme of the Act is such that objecting employees who succeed with their petition may have the effect of removing from the Board its discretionary authority to grant outright certification but, even if every union supporter were to undergo such a change of heart, they could never relieve the Board of its obligation to direct a certification vote. I do not regard this as a perverse outcome because of the fact that the Board will have had before it evidence, albeit hearsay evidence, of recent and substantial interest on the part of employees in union representation. That there should be contemporaneous evidence of indecision in that regard (an opposing petition) does not seem to me to be grounds for denying all employees the right to express their feelings with the clarity and privacy a government supervised secret ballot vote provides, sheltering the individual as it does against both peer group and employer pressures.

7. Moreover it seems to me labour relations is often ill-served by an undue pre-occupation with symmetry. I would not, for instance, feel that equity is in anyway offended by the absence of a provision for outright termination of bargaining rights where evidence of such a desire exceeds 55%. Such a provision might have its advantages from an administrative viewpoint but its absence would have no equity implications for the applicants or other individual employees involved and whose interests I understand to be the primary concern of the legislators. Nor would I argue the need for symmetry between the certification and termination provisions of the Act insofar as the minimum level of support required in order for the applicants to succeed in winning the right to a vote. Legislative provisions requiring a lower level of evidence in support of a certification vote than a termination vote would not be inequitable vis-a-vis the individual employees affected. A

coherent argument can be made to the effect that easier access to a certification vote would be consistent with public policy of encouraging collective bargaining, while the requirement of a higher level of support for termination or displacement applications would protect employees involved in a mature collective bargaining relationship against disruptions in the workplace which could result from termination applications which were specious in their nature.

8. However, the manner in which the Board views and acts upon evidence of support for one side or the other in both certification and termination applications does raise the equity issue in a direct fashion.

9. In a certification application the union is laying claim to institutional (bargaining) rights and in a termination application it is defending those same institutional rights. In both cases the success or failure of the union rests on its ability to gain and hold the support of a majority of the individuals in the bargaining unit and it is the responsibility of the Board to fathom the wishes of those individuals *not of the union*, whose wishes are manifestly apparent.

10. Just as the Board perceives itself as being required to direct a certification vote given the evidence of a certain level of support and notwithstanding the amount of evidence in opposition, in my view even if the minimum required by the Act were to be different in each type of case, if termination applicants can meet the minimum required of them the Board should perceive itself as being required to direct a termination vote notwithstanding any amount of evidence in opposition to the prayer. This is where symmetry is called for because it involves equality in the treatment of evidence.

11. In *Norman Eckert and Company Limited*, [1969] OLRB Rep. June 438, my former colleague H. F. Irwin canvassed this matter and hypothesized a situation involving a bargaining unit of 1000 employees. He pointed out that a termination application by 500 employees, the minimum required under the Act at that time, could fail as a result of one employee submitting a counter-petition. Thus the expressed desire for a vote by 49.9% of the employees would have been frustrated by 2.1% of the group. In the case before us, wherein the minimum requirement is now 45%, two signatures overlap those of the applicant petitioners with the effect of "reducing" their support to 43.3%. These two termination examples are to be contrasted with the hypothetical example of a trade union submitting 450 cards in support of an application for certification involving a bargaining unit of 1000 employees. In such a case even if all 1000 employees, (that is, *including* the 450 who originally supported the applicant union) were to voluntarily sign a petition opposing the situation, the Board would still order a certification vote.

12. Moreover all of this is being played out against the background of similar successful applications for votes to test union support in full-time and part-time units of this same employer at multiple locations, with all of the applications having been consolidated for hearing and disposition by this panel of the Board. Can we doubt for one minute that a desire to have the question tested by a secret ballot vote is widespread and substantial throughout those units of the company wherein the union presently holds bargaining rights? In light of the answer to which I believe we are undoubtedly driven, can we deny the applicant a vote in this one case?

13. To deny a vote requires us to uphold an interpretation within the apparent discretionary authority of the Board and of the Act which, while consistent with past Board decisions, nonetheless can be arrived at only through what I would perceive as inequitable treatment of evidence proffered by two groups of individuals. The resultant decision is therefore perverse and discriminatory.

14. Surely the Board's approach to the administration of public policy should first concern

itself with a balancing of the respective rights and interests of these two groups of individuals before turning its concern to the institutional rights of the union. For, let there be no doubt, notwithstanding the style of cause of the application, the labour relations question at issue here is "What are the true wishes of the majority of these individuals"? We do no favour to employees by leaving the question unresolved.

15. In the foregoing analysis I have expressed criticism of both the legislation and its interpretation by the Board. Both critiques require further comment.

16. As a member of the tribunal responsible for administration of the *Labour Relations Act*, I recognize the questionable propriety of my having criticized the legislation which created the tribunal on which I serve. However, the Labour Relations Board is unusual in that the Act makes specific provision for representatives of employer and union interests on each panel. It becomes significant then to examine the nature of my "criticism" given that I am a representative of employer interests. The concerns I have expressed relate to the readiness with which employees may have access to a Board supervised secret ballot vote. In the instant case the beneficiaries would have been applicants for a termination vote. In other instances, however, I have argued with equal force on behalf of a significant easing of the tests an applicant for certification need only meet in order to obtain a certification vote.

17. My criticism is as to the manner in which the Board, acting within its own discretionary power, has viewed and weighed the evidence of the respective parties. As a member of the tribunal I feel it is not only a right but indeed a responsibility for me to comment on practices, procedures or policies where I perceive them to be inequitable or not serving to promote good labour/management relations. In such instances, as in the matter before us, however forcefully I express my opinions I would hope those opinions are not taken to be a reflection on my panel colleagues. The policy involved in this case is one of long-standing. The passage of time has permitted the consequences of those decisions to have become apparent in a manner such as to persuade me that the policy, procedure or practice, however correct it may have seemed when originally decided, has been overtaken by events in the development of labour/management relations and is now inappropriate and contra-indicated in my view.

18. In my view, the sections of the Act upon which the decision turns are capable of an interpretation which would allow the Board to have granted a vote. Indeed, as I have indicated on many occasions, I would think the interests of labour/management relations would be better served if in all cases where there are grounds to believe that substantial numbers of employees would prefer a secret ballot vote, whether for certification or termination purposes, the Board policy were to accede to that request. Under such a policy questions as to the voluntariness of petitions would not need to be of concern since the ultimate test would be the secret ballot.

19. Based on the foregoing views I would have granted the applicants their vote.

0370-86-R Walls and Ceilings Contractors Association of Ottawa - Association Des Constructeurs De Murs Et Plafonds D'Ottawa, Applicant, v. United Brotherhood of Carpenters and Joiners of America, Local 2041, Respondent

Accreditation - Board determining employer bargaining unit in Board Area 15 for residential work performed by Carpenters' Union - Issuing certificate of accreditation to applicant

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *D. A. MacDonald* and *J. J. Redshaw*.

APPEARANCES: *L. A. Roine* and *David Gibson* for the applicant; *David Jewitt*, *Don Guilbeault* and *Maurice Potvin* for the respondent.

DECISION OF THE BOARD; January 6, 1987

1. The name of the applicant is amended to "Walls and Ceilings Contractors Association of Ottawa - Association Des Constructeurs De Murs Et Plafonds D'Ottawa".

2. This is an application for accreditation in which the applicant seeks to be accredited as the bargaining agent for certain employers who have a bargaining relationship with the respondent. The respondent is a trade union within the meaning of sections 1(1)(p) and 117(f) of the *Labour Relations Act*. The respondent is a party to the collective agreement which is filed with the Board. This collective agreement is dated February 14, 1986 and is effective until April 30, 1987. Also parties to the collective agreement are a number of employers in the residential sector of the construction industry. The applicant assisted these employers in negotiations that led to this collective agreement. Because the collective agreement affects more than one employer in the geographic area and sector which are the subject matter of this application and was in effect on May 2, 1986 (the date of this application), the Board finds that it has jurisdiction under section 125 of the *Labour Relations Act* to entertain this application.

3. The applicant is an Ontario corporation without share capital under Letters Patent issued January 5, 1976. The applicant was incorporated for purposes that include the regulation of relations between employers and employees in the walls and ceilings industry and to represent such employers in collective bargaining within any sector of the construction industry in any geographic area defined under the Act. In addition to its Letters Patent, the applicant filed By-law No. 1 dated February 9, 1976, By-law No. 2 dated February 9, 1976, By-law No. 3 dated February 9, 1976, and By-Law No. 4 (which amends By-law No. 1) dated August 19, 1985. The applicant status is not challenged and on the basis of the evidence before the Board, we find that the applicant is an employer's organization within the meaning of section 1(1)(j) and 117(d) of the Act and further that it is a properly constituted organization for the purposes of section 127(3) of the Act.

4. The applicant filed evidence of representation on behalf of 11 employers. The evidence of representation is in the form of 12 individual documents (2 of which relate to the same employer) each entitled Authorization to Act as Accredited Bargaining Agent. These are in the standard form and each authorizes the applicant to represent the employer signing it as bargaining agent in all matters in negotiations with the respondent. Each authorization also vests in the applicant "the necessary and appropriate authority ... to enable it to discharge the responsibilities of an accredited bargaining agent under the *Labour Relations Act*". The applicant also filed a duly completed Form 88, Declaration Concerning Representation Documents, in support of its documentary evidence of representation. The Board is satisfied that the evidence of representation is con-

sistent with the requirements of sections 108 and 120 of the Board's Rules of Procedure. Further, the Board is satisfied that each of the individual employers on behalf of the whom the applicant has submitted evidence of membership has vested appropriate authority in the applicant to enable it to discharge the responsibilities of an accredited bargaining agent.

5. The unit of employees requested by the applicant consists of all employers of employees for whom the respondent now has or may hereafter obtain bargaining rights in Board Area 15. The collective agreement referred to in paragraph 2 above contains the following recognition clause:

ARTICLE 2: Recognition

2.01 (a) The employer recognizes the Union as the sole and exclusive bargaining agent for all employees of the employer engaged in the installation and finishing of steel stud and drywall and acoustical systems in the residential sector of the construction industry.

(b) Townships of Winchester and Williamsburgh in Dundas County; Carleton County (save and except the Township of Marlborough) and the Counties of Prescott, Glengarry, Russell and Stormont.

All as per Board Area 15 as defined by the Ontario Labour Relations Board.

(c) The Union recognizes the Walls and Ceilings Contractors Association ("WACCA") as the accredited bargaining agent for all the employers engaged in the installation and finishing of steel stud and drywall systems in the residential sector of the construction industry as defined by the Ontario Labour Relations Board Area 15, or in any event recognizes WACCA as the sole and exclusive bargaining agent for all of the employers listed in Appendix "A" attached hereto who are similarly engaged in the installation and finishing of steel stud and drywall systems in the residential sector of the construction industry in the aforementioned Board Area 15.

2.02 "Residential Sector" shall mean the Residential Sector division of the construction industry as determined by work characteristics in the above-mentioned geographical area and, without restricting the generality of the foregoing, shall be deemed to include all work, whether original construction, alterations, renovations, repairs or extensions, covered in the Trade Jurisdiction Clause of this Collective Agreement on or in connection with the construction of single family dwellings, duplexes, doubles, row housing, townhouses, condominiums, garden homes, executive homes, co-operative housing, time sharing developments, rooming houses, boarding houses, and apartment buildings.

Without restricting the generality of the foregoing, where any construction, alterations, renovations, repairs or extensions covered in the trade jurisdiction of this Collective Agreement involve work in the residential sector and the industrial commercial and institutional sector (the ICI sector), the parties hereto agree that any work falling within the ICI sector shall be excluded from the operation of this Agreement and shall be performed in accordance with whatever collective agreement covers the work in that sector. The remaining work however on any such "mixed project" shall be performed in accordance with the provisions of this Collective Agreement. This definition of residential work shall apply without regard to the percentage of any such "mixed project" which is determined to be residential or ICI work.

Article 2.01 (b) refers to Carleton County which has been subsumed within the regional Municipality of Ottawa-Carleton as a result of the municipal reorganization that led to the establishment of

that regional municipality. In addition, the Township of Marlborough, as such, no longer exists. The Counties of Prescott, Glengarry, Russell and Stormont are now the United Counties of Stormont, Dundas and Glengarry and constitute Board Area 31. Notwithstanding that the collective agreement purports to recognize the respondent as the bargaining agent for employees of employers party to it were engaged in the work described in Article 2.01 (a), those bargaining rights are in fact held by another trade union. Having regard to the evidence and the agreement of the parties, the Board finds that the following describes a unit of employers that is appropriate for collective bargaining:

all employers of employees for whom the United Brotherhood of Carpenters and Joiners of America, Local 2041 has bargaining rights in Board Area 15, being the Regional Municipality of Ottawa-Carleton and United Counties of Prescott and Russell in the residential sector of the construction industry, and for such other employers for whose employees the United Brotherhood of Carpenters and Joiners of America, Local 2041 may after the accreditation date obtain bargaining rights through certification or voluntary recognition in the geographic area in sectors set out in the appropriate unit of employers.

6. In accordance with the Board's Rules of Procedure, notice of this application was sent to 16 employers. Of these notices 2 could not be delivered to the employers to whom they were addressed and were returned to the Board. These two and five other employers did not make the requisite filings in Form 94 and Schedule H. All 7 of these employers are party to the above referenced collective agreement with the respondent. In addition, the parties provided the Board with information relating to the employees on the payroll of the 7 employers for the weekly payroll period immediately preceding the date of the application which are affected by this application based on the remittances made by those employers to the respondent with respect to such employees. These remittances are summarized in employer contribution reports to the residential employee benefit trust which consists of union dues, deductions and contributions to the respondent's welfare, pension, training, motion, and industry funds. On the basis of the evidence before the Board with respect to the employers from whom filings were not received, the Board finds as follows:

Employer No. 4 - *Construction Richard Lessard* is an employer in the unit of employers which had no employees affected by this application in the payroll period immediately preceding May 2, 1986 but which did at other times within the period of one year prior to the date of the making of this application have such employees and should be placed on Schedule E.

Employer No. 6 - *Jean-Yves Bernard Drywall Enr.* is an employer in the unit of employers which had no employees affected by this application in the payroll period immediately preceding May 2, 1986 but which did at other times within the period of one year prior to the date of the making of this application have such employees and should be placed on Schedule E.

Employer No. 8 - *Korban Inc.* is an employer in the unit of employers which had no employees affected by this application in the payroll period immediately preceding May 2, 1986 but which did at other times within the period of one year prior to the date of the making of this application have such employees and should be placed on Schedule E.

Employer No. 9 - *Leduc & Associates* is an employer in the unit of employ-

ers which had no employees affected by this application at any time within the period of one year prior to the date of the making of this application and should be placed on Schedule F.

Employer No. 13 - *R. Chabot General Contractor* is an employer in the unit of employers which had 3 employees affected by this application in the payroll period immediately preceding May 2, 1986 and should be placed on Schedule E.

Employer No. 15 - *Trans Canada Painters Inc.* is an employer in the unit of employers which had 8 employees affected by this application in the payroll period immediately preceding May 2, 1986 and should be placed on Schedule E.

Employer No. 16 - *Valley Interiors* is an employer in the unit of employers which had no employees affected by this application at any time within the period of one year prior to the date of the making of this application and should be placed on Schedule F.

7. On the basis of the representations of the employers who did make the required filings, the other evidence submitted, and the representations of the parties, the Board has drawn up the following list of employers. The employers listed on final Schedule E are those who had employees affected by the application in the year preceding May 2, 1986, the date of the making of this application. Those on final Schedule F have not had such employees.

Final Schedule 'E'

Advance Drywall Ltd;
Aristocraft Drywall Ltd;
A & G D'Angelo Drywall Ltd;
Construction Richard Lessard;
D'Angelo Plastering (1983) Company Ltd;
Jean-Yves Bernard Drywall Enr;
Korban Inc;
Nation Drywall Contractors Limited;
Nick Giamberardino Brothers Ltd;
Ormersher Decor (1980) Limited;
R. Chabot General Contractor;
Sapacon Drywall Ltd;
Trans Canada Painters Inc.

Final Schedule 'F'

J. R. Noel Plastering;
Leduc & Associates;
Valley Interiors.

8. On the evidence, and pursuant to the provisions of section 127(1)(a) of the Act, the Board finds that the 13 employers on final Schedule E are the employers in the unit of employers in the date of the making of the application who have within one year prior to such date had employees for whom the respondent had bargaining rights in the residential sector in Board Area 15, the sector and geographic area that the Board has determined to be appropriate.

9. On the basis of all the evidence, the Board has ascertained, pursuant to section 127(1)(b) of the Act, that the applicant represented 10 of the employers on final Schedule E on the date of the making of this application. Accordingly, the Board is satisfied that the majority of the employers in the unit of employers are represented by the applicant. In addition, section 127(2)(b) of the Act requires that the Board be satisfied that the employers represented by the applicant employ the majority of the employees ascertained by the Board pursuant to section 127(1)(c). Pursuant to section 127(1)(c), the relevant payroll period is the weekly payroll period immediately preceding the making of the application. The Board is satisfied that such a payroll period, in this case the weekly payroll period immediately preceding May 2, 1986, is a satisfactory period for making such a determination.

10. On the basis of the evidence submitted, and pursuant to section 127(1)(c), the Board finds that there were 75 employees affected by this application during the weekly payroll period immediately preceding May 2, 1986. The Board further finds that the 10 employers represented by the applicant employed 64 of those employees. The Board is therefore satisfied that the majority of employers represented by the applicant employ the majority of the employees ascertained pursuant to section 127(1)(c) of the Act.

11. Having regard to all of the foregoing and in accordance with the provisions of section 127(2) of the Act, a certificate of accreditation will issue to the applicant for the unit of employers that has been found by the Board to be appropriate: that is, all employers of employees for whom the United Brotherhood of Carpenters and Joiners of America, Local 2041 has bargaining rights in Board Area 15, being the Regional Municipality of Ottawa-Carleton and United Counties of Prescott and Russell, in the residential sector of the construction industry, and for such other employers for whose employees the United Brotherhood of Carpenters and Joiners of America, Local 2041 may after the accreditation date obtain bargaining rights through the certification or voluntary recognition in the geographic area and sector set out in the appropriate unit of employers.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1728-85-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Vollmer & Associates Contractors Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all journeymen and apprentice insulators and asbestos workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all journeymen and apprentice insulators and asbestos workers in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2800-85-R: Labourers' International Union of North America, Local 527 (Applicant) v. The McBride Group Inc. and 21st Century Building Restoration (Cabot Trust) and 556029 Ontario Limited (Respondents) v. The Operative Plasterers and Cement Masons International Association, Local 598 (Intervener)

Unit #1: "all construction labourers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all construction labourers in the employ of the respondents in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit) (*Having regard to the agreement of the parties*)

3066-85-R: Ontario Nurses' Association (Applicant) v. Toronto General Hospital (Respondent)

Unit: "all registered and graduate nurses of the respondent in the Municipality of Metropolitan Toronto, regularly employed in a nursing capacity for not more than twenty-four (24) hours per week, save and except head nurses, head nurses/occupational health department, persons above the rank of head nurse, head nurse/occupational health department, staff development personnel, registered nursing assistants, non-registered nursing assistants, operating room technicians, and employees in bargaining units for which any trade union held bargaining rights as of March 18, 1986" (269 employees in unit) (*Having regard to the agreement of the parties*)

0086-86-R: Ontario Nurses Association (Applicant) v. St. Joseph's Heritage (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote*)

Unit #2: "All lay registered and graduated nurses regularly employed for not more than 24 hours per week, in a nursing capacity, by the respondent at its Bethammi Nursing Home in the City of Thunder Bay, save and except head nurses, persons above the rank of head nurse, and employees in bargaining units for which any trade union held bargaining rights as of April 9, 1986" (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0130-86-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 (AFL-CIO-CLC) (Applicant) v. Telkom Corporation, c.o.b. as Electronic Warehouse (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period” (65 employees in unit) (*Having regard to the agreement of the parties*)

0516-86-R: Canadian Union of Public Employees (Applicant) v. Community Information Centre of Metropolitan Toronto (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period” (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods, save and except supervisors, persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1982-86-R: Labourers’ International Union of North America, Local 607 (Applicant) v. Bay-Walsh Ltd. (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in the District of Thunder Bay, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2011-86-R: Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. Palais des Sports Glengarry Sports Palace (Respondent)

Unit: “all employees of the respondent in Alexandria, save and except managers, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

2024-86-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Custom Foam Specialities Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at Kitchener, save and except foremen, persons above the rank of foreman, and office and sales staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

2030-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. H. G. Air Systems Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: “all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

Unit #2: “all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham,

excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

Unit #3: “all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of the respondent in the Township of O’Brien and the surrounding townships of Teetzel, Gurney, Fauquier, Nansen, Swanson, Sulman, Owens and Williamson in the District of Cochrane, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2079-86-R: United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Applicant) v. Frank Pellegrino General Contracting Limited (Respondent)

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2102-86-R: Ironworkers District Council of Ontario (Applicant) v. Edwards Steel Fabricators Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all ironworkers and ironworkers’ apprentices in its employ in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in its employ in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (29 employees in unit) (*Having regard to the agreement of the parties*)

2105-86-R: London and District Service Workers’ Union, Local 220, S.E.I.U., AFL-CIO-CLC (Applicant) v. DES Security Systems Corporation (Respondent)

Unit: “all employees of the respondent at Sarnia, Ontario save and except supervisors, and persons above the rank of supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

2112-86-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Greenwall Forming Limited, Cedar Forming Limited and Luna Construction & Forming Ltd. (Respondents)

Unit #1: “all employees of Greenwall Forming Limited engaged in concrete forming on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman” (31 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of Cedar Forming Limited engaged in concrete forming on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria,

save and except non-working foremen and persons above the rank of non-working foreman” (29 employees in unit) (*Having regard to the agreement of the parties*)

2176-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dunlop Canada Inc., c.o.b. as Res-Tec Products (Respondent)

Unit: “all employees of the respondent at Stephen Township, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week” (6 employees in unit) (*Having regard to the agreement of the parties*)

2210-86-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Cancoil Thermal Corporation (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the County of Frontenac, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period” (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2219-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Courtice Auto Wreckers Limited (Respondent)

Unit: “all employees of the respondent at the Port of Oshawa, save and except foremen, persons above the rank of foreman, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1986” (5 employees in unit) (*Having regard to the agreement of the parties*)

2243-86-R: Ontario Nurses’ Association (Applicant) v. Ballycliffe Lodge Limited (Respondent)

Unit: “all registered and graduate nurses of the respondent employed in a nursing capacity at its nursing home in Ajax, save and except Director of Nursing, persons above the rank of Director of Nursing, and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

2254-86-R: United Food & Commercial Workers International Union (Applicant) v. Saan Stores Ltd. (Respondent)

Unit #1: “all employees of the respondent in Fort Frances, Ontario, save and except assistant managers, persons above the rank of assistant manager, management trainee, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period in Fort Frances, save and except assistant managers, and persons above the rank of assistant manager” (7 employees in unit) (*Having regard to the agreement of the parties*)

2256-86-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Eagle Stone Limited (Respondent)

Unit #1: “all employees of the Respondent at Gormley, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (23 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

2257-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. L. Fritz Reclamation & Processing Limited (Respondent)

Unit: “all employees of the respondent at Sault Ste. Marie, save and except superintendent and persons above the rank of superintendent” (10 employees in unit) (*Having regard to the agreement of the parties*)

2265-86-R; 2267-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Metro Railing Ltd. (Respondent)

Unit #1: “all employees of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all carpenters, carpenters’ apprentices, labourers, ironworkers, and ironworkers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic townships of Esquering and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2270-86-R: Graphic Communications International Union, Local 500M (Applicant) v. Telfer Packaging Limited (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed during the school vacation period” (132 employees in unit) (*Having regard to the agreement of the parties*)

2271-86-R: United Brotherhood of Carpenters & Joiners of America, Local Union 1669 (Applicant) v. Prairie Rim Petroleum General Contractors Ltd. (Respondent)

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2272-86-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Kert Chemical Industries Inc. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (63 employees in unit) (*Having regard to the agreement of the parties*)

2294-86-R: The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Coiltube Thermal Industrial Services Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (13 employees in unit)

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional

sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit) (*Clarity Note*)

2300-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Huffman Construction Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2301-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Kinell Forming Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2302-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. E & P Sodding Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2303-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Eagle Contracting and Landscaping Consulting & Designing (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2308-86-R: United Steelworkers of America (Applicant) v. Allan Windows Incorporated (Respondent)

Unit: "all employees of the respondent in Concord, save and except foremen, persons above the rank of fore-

man, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period” (22 employees in unit) (*Having regard to the agreement of the party*)

2320-86-R: Canadian Paperworkers Union (Applicant) v. Innovative Corrugated Industries Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Oakville, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the party*)

2324-86-R: The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 463 (Applicant) v. S. Breda Plumbing Ltd. (Respondent)

Unit #1: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit) (*Clarity Note*)

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit) (*Clarity Note*)

2326-86-R: Canadian Union of Public Employees (Applicant) v. Dufferin Association for the Mentally Retarded (Respondent)

Unit: “all employees of the respondent in the Town of Orangeville regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant supervisor, persons above the rank of assistant supervisor, office and clerical staff, persons employed pursuant to special government grants, programmes or projects, and persons for whom any trade union held bargaining rights as of the date of application, November 14, 1986” (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2351-86-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Interpaving Limited (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in union)

2359-86-R: United Steelworkers of America (Applicant) v. F. S. Tool Corporation (Respondent)

Unit: “all employees of the respondent in Markham, save and except forepersons, persons above the rank of foreperson, office and sales staff, driver/salespersons, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period” (25 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2362-86-R: International Union of Bricklayers & Allied Craftsmen, Local 7 Canada (Applicant) v. E/E Fradema Masonry (Respondent)

Unit #1: “all bricklayers and bricklayers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all bricklayers and bricklayers’ apprentices in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2370-86-R: Canadian Union of Public Employees (Applicant) v. Bruce-Grey County Roman Catholic Separate School Board (Respondent)

Unit: “all employees of the respondent in Bruce-Grey Counties regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in maintenance and plant operations, save and except supervisor, persons above the rank of supervisor, office staff, and employees in bargaining units for which any trade union held bargaining rights as of November 20, 1986” (14 employees in unit) (*Having regard to the agreement of the parties*)

2376-86-R: Ontario Nurses’ Association (Applicant) v. Leisure World Health Care Inc. (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in Brantford, save and except the Director of Nursing and persons above the rank of Director of Nursing” (5 employees in unit) (*Having regard to the agreement of the parties*)

2383-86-R: Labourers’ International Union of North America (Applicant) v. Rainbow Renovations General Contractor (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2398-86-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Advice Pipelines Ltd. (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2403-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Sera Construction Ltd. (Respondent)

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

2410-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nolan Construction Ltd. (Respondent)

Unit #1: "all construction industry labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2419-86-R: Labourers' International Union of North America, Local 527 (Applicant) v. Imperial Masonry and Construction (Ottawa) Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2443-86-R: Labourers' International Union of North America, Local 1081 (Applicant) v. E. R. Masonry Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2445-86-R: United Brotherhood of Carpenters' & Joiners of America, Local Union 27 (Applicant) v. F. T. Construction Inc. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2486-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Brioux Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices and construction labourers in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1758-85-R: Energy & Chemical Workers Union (Applicant) v. Ontario/Quebec Personnel Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent engaged on behalf of or in connection with the operations of Diesel Recon Canada (A Division of Cummins Americas, Inc.) in Cornwall save and except foremen, persons above the rank of foreman, office sales and technical staff" (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		34
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		12

0184-86-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. The Dufferin-Peel Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in its schools in the Regional Municipality of Peel and the County of Dufferin save and except employees in bargaining units for which any trade union held bargaining rights on April 18, 1986" (267 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		266
Number of persons who cast ballots	160	
Number of spoiled ballots		17
Number of ballots marked in favour of applicant		128
Number of ballots marked against applicant		15

2047-86-R: Employees' Association, St. Mary's of the Lake Hospital (Applicant) v. St. Mary's of the Lake Hospital (Respondent)

Unit: "all employees of the respondent in Kingston regularly employed for not more than twenty-four (24) hours per week, save and except the sisters, professional medical staff, registered nursing staff, non-registered nurses, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, secretary to the administrator, secretary to the Personnel Director, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, payroll officer, all persons above the rank of supervisor or foreman and chief engineer and persons in bargaining units for which any trade union held bargaining rights as of October 17, 1986" (94 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		99
Number of persons who cast ballots	53	
Number of ballots marked in favour of applicant		51
Number of ballots marked against applicant		2

Applications for Certification Dismissed Without Vote

3042-84-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Windsor (Respondent) (67 employees in unit)

0674-85-R: Local Union 93, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd., Fix Fast Ltd./Ltee., Bona Building & Construction Limited and Bona Building & Management Company Limited (Respondents) v. Labourers' International Union of North America, Local 527 (Intervener)

2106-85-R: Le Syndicat des Employes de Ser Vaas (CSN) (Applicant) v. SerVaas Rubber Company Inc. (Respondent) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Intervener) (38 employees in unit)

0699-86-R: Labourers' International Union of North America, Local 527 (Applicant) v. Underground Services (1983) Ltd. (Respondent) (12 employees in unit)

0915-86-R: United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 71 (Applicant) v. Trimech Plumbing and Heating Limited (Respondent) (4 employees in unit)

0937-86-R; 0938-86-R: Laundry & Linen Drivers & Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 656508 Ontario Limited and Gruyich Services Inc., a Limited Partnership (Respondent) v. Group of Employees (Objectors) (146 employees in unit)

Unit #1: (see *Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*)

2145-86-R: Canadian Union of Public Employees (Applicant) v. Hornepayne Community Hospital (Respondent) v. Group of Employees (Objectors) (42 employees in unit)

2177-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Barrincorp Industries Inc. (Respondent) (2 employees in unit)

2228-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Mazza Brothers Haulage Ltd. (Respondent) (2 employees in unit)

2226-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Metro Railing Ltd. (Respondent) (5 employees in unit)

2231-86-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers (Applicant) v. Seven-Up Canada Inc. (Respondent) (370 employees in unit)

2255-86-R: Canadian Union of Public Employees (Applicant) v. The Broadview Foundation (Respondent) v. Group of Employees (Objectors) (89 employees in unit)

2267-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Metro Railing Ltd. (Respondent) (6 employees in unit)

2325-86-R: Canadian Union of Service & Hotel Employees (Applicant) v. Horseshoe Valley Resort (Respondent) (108 employees in unit)

2357-86-R: Magnussen & Control Plus Employees Association (Applicant) v. Magnussen Furniture Manufacturers Limited and Control Plus Inc. (Respondents) (97 employees in unit)

2468-86-R: Ontario Nurses' Association (Applicant) v. Regional Municipality of Ottawa-Carleton (Centre d'Accueil Champlain) (Respondent) v. Civic Institute of Professional Personnel (C.I.P.P.) (Intervener) (7 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3228-85-R: Roger Simpson (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Union Local No. 880 (Respondent) v. Omstead Foods Limited (Intervener)

Unit: "all employees of the intervener at the plants owned and operated by the Company in the Township of Ramney and Mersea, except watchmen, members of the Omstead family, working foremen and foreladies, those above the rank of working foremen and working foreladies, persons employed in the growing and harvesting of agricultural products, seasonal employees, office staff and quality control, pollution control and retail sales personnel, and students employed for the summer months from May 15th to September 15th" (388 employees in unit)

Number of persons who cast ballots	367	
Number of spoiled ballots		3
Number of ballots marked in favour of respondent		27
Number of ballots marked against respondent		337

0086-86-R: Ontario Nurses' Association (Applicant) v. St. Joseph's Heritage (Respondent) v. Group of Employees (Objectors)

Unit #1: "all lay registered and graduate nurses employed in a nursing capacity by the respondent at its Bethammi Nursing Home in the City of Thunder Bay, save and except head nurses, persons above the rank of head nurse, employees regularly employed for not more than 24 hours per week, and employees in bargaining units for which any trade union held bargaining rights as of April 9, 1986" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names on list as originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		5

Unit #2: (see *Bargaining Agents Certified Without Vote*)

0937-86-R; 0938-86-R: Laundry & Linen Drivers & Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 656508 Ontario Limited and Gruyich Services Inc., a Limited Partnership (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (131 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		155
Number of persons who cast ballots	136	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		62
Number of ballots marked against applicant		67
Ballots segregated and not counted		3
Ballots segregated and not to be counted by agreement of the parties		3

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

Applications for Certification Withdrawn

0015-86-R; 0016-86-R; 0058-86-R; 0059-86-R; 0060-86-R; 0065-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. R. A. Bell Cartage Limited (Respondent)

0066-86-R; 0067-86-R; 0068-86-R; 0077-86-R; 0384-86-R; 0433-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Lakehead Freightways Limited (Respondent)

0386-86-R: St. Michael's College School Teachers' Association (Applicant) v. St. Michael's College School (Respondent)

0558-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bramalea Limited and Apollo 8 Maintenance Services Limited (Respondents) v. Fidinam (Canada) Limited (Intervener)

1873-86-R: Canadian Union of Public Employees (Applicant) v. Versa Services (University of Toronto) Respondent

2133-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. 33 Jackes Avenue Limited, and Kenair Apartments (Respondents)

2339-86-R: Canadian Union of Service and Hotel Employees (Applicant) v. Armat Food Services Inc. (Respondent)

2343-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. M. M. Construction Co. Ltd. (Respondent)

2367-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Applicant) v. Nicholls Radtke Ltd. (Respondent)

2395-86-R: United Steelworkers of America (Applicant) v. Haley Industries Limited (Respondent)

2396-86-R: The International Union of United Automobile, Aerospace & Agricultural Implement Workers of America (UAW-CLC), Local 251 (Applicant) v. Corporation of the Township of Dover (Respondent)

2397-86-R: The International Union of United Automobile, Aerospace & Agricultural Implement Workers of America (UAW-CLC), Local 251 (Applicant) v. Dresden Knechtel Food Market (Respondent)

2420-86-R: Labourers' International Union of North America, Local 1081 (Applicant) v. E.R. Masonry Ltd. (Respondent)

2442-86-R: Labourers' International Union of North America, Local 1059 (Applicant) v. B. Lumley Wrecking, R. Lumley Demolition Inc., Royal Demolition (Respondents)

2461-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Topsite Contr. Ltd. (Respondent)

2467-86-R: I.L.G.W. Union (Applicant) v. Astro Sportswear Mfg. (Respondent)

2623-86-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. J. P. Pierman Construction Ltd., 579593 Ontario Ltd. (Respondents)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0819-86-FC: Toronto Typographical Union, Local 91 (Applicant) v. Burlington Northern Air Freight (Canada) Ltd. (Respondent) (*Granted*)

2230-86-FC: The Ontario Secondary School Teachers' Federation (Applicant) v. The Haldimand Board of Education (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2665-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd./Les Coffrages C.C.C. Ltee., Fix Fast Ltd. (Respondents) (*Withdrawn*)

0557-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bramalea Limited and Angus Consulting Management Limited (Respondent) v. Fidinam (Canada) Limited (Intervener) (*Withdrawn*)

0697-86-R: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Merit Dry-wall & Acoustics Limited and T.W. Broome (Respondents) (*Dismissed*)

1234-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. R. C. Pruefer Co. Limited

and Rose-Ville Gardens of Windsor Limited (Respondents) v. Construction Workers Local 53, affiliated with the Christian Labour Association of Canada (Intervener) (*Withdrawn*)

1239-86-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. R. C. Pruefer Co. Limited, 496986 Ontario Limited, 658686 Limited and Rose-Ville Gardens of Windsor Limited (Respondents) v. Construction Workers Local 53, affiliated with the Christian Labour Association of Canada (Intervener) (*Withdrawn*)

1251-86-R: United Food & Commercial Workers Union, Local 206, chartered by the United Food & Commercial Workers International Union (Applicant) v. Dominion Stores Limited and Zehrs Markets, A Division of Zehrmart Ltd. (Respondents) (*Withdrawn*)

2112-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwall Forming Limited, Cedar Forming Limited, Luna Construction & Forming Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0556-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bramalea Limited (Respondent) v. Fidinam (Canada) Limited (Intervener) (*Granted*)

0557-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bramalea Limited and Angus Consulting Management Limited (Respondents) v. Fidinam (Canada) Limited (Intervener) (*Withdrawn*)

1238-86-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. R. C. Preufer Co. Limited, 496986 Ontario Limited, 658686 Ontario Limited and Rose-Ville Gardens of Windsor Limited (Respondents) v. Construction Workers Local 53, affiliated with the Christian Labour Association of Canada (Intervener) (*Withdrawn*)

1252-86-R: United Food & Commercial Workers Union, Local 206, chartered by the United Food & Commercial Workers International Union (Applicant) v. Zehrs Markets, a Division of Zehrmart Ltd. (Respondent) (*Withdrawn*)

1374-86-R: Toronto-Central Ontario Building & Construction Trades Council and The International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicants) v. Elmont Construction Limited, Bruce N. Huntley Contracting Limited and 482575 Ontario Limited (Respondents) (*Granted*)

1455-86-R: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Respondent) v. Merit Drywall & Acoustics Limited and T.W. Broome (Respondents) (*Dismissed*)

2048-86-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. R. C. Preufer Co. Limited and Rose-Ville Gardens of Windsor Limited (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNION SUCCESSOR STATUS

1838-86-R: The Canadian Union of Public Employees (Applicant) v. The Staff Association Waterloo County Health Unit (Respondent) v. The Regional Municipality of Waterloo (Intervener) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2446-85-R: Craig Scurr (Applicant) v. Service Employees Union, Local 183 (Respondent) v. Belleville Plaza (Intervener) v. Group of Employees (Objectors) (*Granted*)

Unit: "all employees at the Belleville Plaza, Dundas Street East, Belleville, Ontario, save and except supervi-

sors, foremen, persons above the rank of supervisor or foreman, and students employed during the school vacation period” (5 employees in unit)

Number of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		3

0340-86-R: William Bowden (Applicant) v. The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Respondent) v. The Rowan Sprinkler Company Limited (Intervener) (*Granted*)

Unit: “all journeymen sprinkler fitters and their apprentices in the employ of The Rowan Sprinkler Company Limited in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Number of names of persons on revised voters’ list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		2
Ballots segregated and not counted		1

0592-86-R: John Correa (Applicant) v. Office & Professional Employees International Union, Local 131 (Respondent) v. Christie Brown & Co., Division of Nabisco Brands Ltd. (Intervener) (*Granted*)

Unit: “all of the office and clerical employees of the employer at 2150 Lakeshore Boulevard West, Toronto, save and except office managers and persons above the rank of office manager, accountant, secretary to the president, secretaries to the vice-presidents, purchasing agent and personnel department employees” (68 employees in unit)

Number of names of persons on list as originally prepared by employer		66
Number of persons who cast ballots	58	
Number of ballots marked in favour of respondent		18
Number of ballots marked against respondent		40

0793-86-R: Alan Gagnon (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Granted*)

Unit: “all employees of Colautti Construction Ltd. in the Regional Municipality of Ottawa Carleton and the United Counties of Prescott and Russell excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same save and except non-working foremen and persons above the rank of non-working foreman” (24 employees in unit)

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		14
Ballots segregated and not counted		1

0827-86-R: The Employees of Fern Brand Waxes Ltd. (Applicant) v. International Union of Allied Novelty & Production Workers, Local 905 (Respondent) v. Fern Brand Waxes Limited (Intervener) (*Dismissed*)

Unit: “all employees of the Company, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods” (23 employees in unit)

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	20	
Number of ballots marked in favour of respondent		1

Number of ballots marked against respondent

19

0867-86-R: Howard S. Schmitt (Applicant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) v. Sam Sniderman Radio Sales & Services Ltd. (Intervener) (*Dismissed*)

1477-86-R: Ralston Edwards, et al. (Applicants) v. International Union of Operating Engineers and its Local 796 (Respondent) v. Citicom Inc. (Intervener) (*Granted*)

Unit: "all employees of Citicom Inc. at the Rideau Centre, save and except supervisors and persons above the rank of supervisor, security guards, control room operators, office and clerical staff, janitorial personnel, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (8 employees in unit)

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		7

1602-86-R: Jacqueline Stievenart and all employees of O'Tooles Roadhouse Restaurant (Applicant) v. Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (Respondent) v. 530810 Ontario Limited c.o.b. as O'Tooles Roadhouse Restaurant (Intervener) (*Granted*)

Unit #1: "all employees of 530810 Ontario Limited c.o.b. as O'Tooles Roadhouse Restaurant at 355 Rexdale Blvd., Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit)

Unit #2: "all employees of 530810 Ontario Limited c.o.b. as O'Tooles Roadhouse Restaurant at 355 Rexdale Blvd., Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff" (17 employees in unit)

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	11	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		10

1613-86-R: Phulmatie Persaud (Applicant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) and its Local 399 (Respondent) v. D.G.M. Dominion General Manufacturing Limited (Intervener) (*Granted*)

Unit: "all employees of D.G.M. Dominion General Manufacturing Limited in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, quality control manager and office and sales staff" (107 employees in unit)

Number of names of persons on list as originally prepared by employer		112
Number of persons who cast ballots	109	
Number of spoiled ballots		2
Number of ballots marked in favour of respondent		31
Number of ballots marked against respondent		76

1676-86-R: John Stevenson & Brian Wager (Applicants) v. The Canadian Paperworkers' Union and its Local 1144 (Respondent) v. Cam Tran Co., Division of 564173 Ontario Inc. (Intervener) (*Dismissed*)

1849-86-R: Ronald Verbaas (Applicant) v. United Steelworkers of America (Respondent) v. Hostmann-Steinberg (Canada) Ltd. (Intervener) (*Granted*)

1977-86-R: Jamie Cirka-Scott on behalf of the Employees of O'Tooles Roadhouse Restaurant (573852 Ontario Inc.) (Applicant) v. The Canadian Union of Restaurant & Related Employees, Hotel Employees &

Restaurant Employees Union Local 88 AFL-CIO-CLC (Respondent) v. O'Tooles's Roadhouse Restaurant, 573852 Ont. Inc. (Intervener) (*Granted*)

2001-86-R: Dale Taylor (Applicant) v. The Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers & Station Employees (Respondent) v. Fast Service Terminals (Intervener) (*Granted*)

2124-86-R: Mrs. Mary Gaskin (Applicant) v. United Steelworkers of America (Respondent) v. Canadian Timken Limited (Intervener) (*Granted*)

2159-86-R: Saint Mary's of the Lake Hospital (Applicant) v. Employee's Association, Saint Mary's of the Lake Hospital (Respondent) (*Withdrawn*)

2247-86-R: Pierre Janisse (Applicant) v. Retail, Wholesale & Department Store Union, and its Local 414 AFL-CIO-CLC (Respondent) (*Granted*)

2286-86-R: Diane Natyshak (Applicant) v. Retail, Wholesale & Department Store Union, and its Local 414, AFL-CIO-CLC (Respondent) (*Granted*)

2432-86-R: The Employees of The London Soap Company Limited (Respondent) v. London & District Service Workers Union, Local 220 (Respondent) (*Dismissed*)

REFERRAL TO APPOINTMENT OF CONCILIATION OFFICER

1672-86-M: Swiss Chalet Employer's Association and Famz Foods Limited, c.o.b. as Swiss Chalet Restaurant (Employer) v. United Food & Commercial Workers International Union, Local 175 (Trade Union) (*Dismissed*)

2125-86-R: Federated Building Maintenance Company Limited (Employer) v. Canadian Union of Postal Workers (Trade Union) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0376-82-U: The Corporation of the City of Toronto (Applicant) v. Metropolitan Toronto Civic Employees, Union Local No. 43 and J. Mele, Business Agent, and W. Brady, D. Jeanes, G. Terrell, C. Greco, C. Philipidis, R. McAdam, T. Cantwell, J. McLennan, D. Schaffer, P. Ferguson, L. Kovacs (Respondents) (*Granted*)

2606-86-U: Steinberg Inc. (Miracle Food Mart Division) (Applicant) v. Teamsters Local Union No. 419, et al. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0368-82-U: Toronto Civic Employees Union, Local No. 43, Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Toronto (Respondent) (*Dismissed*)

0446-85-U: Toronto Typographical Union, Local 91 (Applicant) v. Burlington Northern Air Freight (Canada) Ltd. (Respondent) (*Granted*)

1867-86-U: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Favignana Fishing Co. Limited (Respondent) (*Dismissed*)

1868-86-U: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. A. Figliomeni & Sons Limited (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1104-83-U: Gerald Lecuyer, Cash Podlewski and John Polhill (Complainants) v. Canadian Paperworkers Union, Local 132 and Canadian Paperworkers Union (Respondents) v. Abitibi-Price Inc. (Intervener) (*Granted*)

3413-84-U: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (AFL-CIO-CLC) (Complainant) v. TV Guide Inc. (Respondent) (*Withdrawn*)

0037-85-U: Toronto Typographical Union, Local 91 (Complainant) v. Burlington Northern Air Freight (Canada) Ltd. (Respondent) (*Granted*)

1409-85-U; 1772-85-U; 2826-85-U; 0380-86-U: Amalgamated Clothing & Textile Workers Union (Complainant) v. Genesta Manufacturing Limited and Hematite Manufacturing Limited (Respondents) (*Dismissed*)

1847-85-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO) (Complainant) v. TV Guide Inc. (Respondent) v. Lee Anne Nicholson, Roderick Jamer, John Kiupers, Barbara Bruner & Andrew Ryan (Interveners) (*Dismissed*)

1977-85-U: Labourers' International Union of North America, Local 183 (Complainant) v. Olympia & York Developments Limited, c.o.b. as Olympia Floor & Wall Tile Co. & Joe Schochet (Respondents) (*Dismissed*)

2039-85-U: Wavell Tucker (Complainant) v. The Canadian Union of Heavy Haulers & Maintenance Workers (Respondent) v. Sure-Way Transport Limited (Intervener) (*Dismissed*)

2059-85-U: United Food & Commercial Workers International Union, AFL-CIO-CLC (Complainant) v. Jac-morr Manufacturing Limited (Respondent) (*Granted*)

2431-85-U: Syndicat des Employes de Servaas (CSN) (Complainant) v. La Compagnie de Caoutchouc Servaas Inc. and Real Lauzon (Respondents) v. Retail, Wholesale & Department Store Union, AFL-CIO-CLC (Intervener) (*Dismissed*)

2579-85-U: Ontario Nurses' Association (Complainant) v. The General Hospital of Port Arthur and Ontario Hospital Association (Respondents) (*Withdrawn*)

0024-86-U: Leslie A. Manders (Complainant) v. Carlton Cards Ltd., Canadian Paperworkers Union, Dieter Plautz, R. Smith and G. Bucella (Respondents) (*Dismissed*)

0071-86-U: Scott Larkin (Complainant) v. United Auto Workers, Local 222 (Respondent) (*Withdrawn*)

0113-86-U: Celso Adriano, Sheet Metal Worker's Union Local 575 (Complainant) v. Carrier Canada Ltd. (Respondent) (*Withdrawn*)

0226-86-U: United Brotherhood of Carpenters & Joiners of America, Local Union 3054 (Complainant) v. Lloyd-Truax Limited Wingham (Respondent) (*Dismissed*)

0729-86-U: The Electrical Power Systems Construction Association, Ontario Hydro and Gilbert Steel Limited (Complainants) v. International Association of Bridge, Structural & Ornamental Iron Workers Local 721, George Joncas, Alfie Thomas, and Aaron Murphy, on their own behalf and on behalf of the respondent union (Respondents) (*Withdrawn*)

0950-86-U: Labourers' International Union of North America, Local 527 (Complainant) v. Underground Services Ltd. (Respondent) (*Withdrawn*)

1221-86-U: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers &

Helpers, Lodge 210 (Complainant) v. M.A.N. Lepper & Canadian Machine Incorporation (Respondent) (*Withdrawn*)

1235-86-U: International Union of Operating Engineers, Local 793 (Complainant) v. R. C. Pruefer Co. Limited and Rose-Ville Gardens of Windsor Limited (Respondents) (*Withdrawn*)

1237-86-U: United Brotherhood of Carpenters & Joiners of America, Local 494 (Complainant) v. R. C. Pruefer Co. Limited, 496986 Ontario Limited, 658686 Ontario Limited, Rose-Ville Gardens of Windsor Limited and Christian Labour Association of Canada, Local 53 (Respondents) (*Withdrawn*)

1296-86-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Saco Fisheries Limited (Respondent) (*Withdrawn*)

1441-86-U: Canadian Union of Public Employees (Complainant) v. Hillside Nursing Home Limited (Respondent) (*Dismissed*)

1478-86-U: Eugene Marks et al. (Complainant) v. United Food & Commercial Workers' International Union, Local 617 (Respondent) (*Withdrawn*)

1560-86-U: Harjeet Dhanoa (Complainant) v. Steel Workers Union Local 7574 (Respondent) (*Withdrawn*)

1591-86-U; 1592-86-U: Thomas Demers (Complainant) v. Aluminum, Brick & Glass Workers International Union, Local 206G and Dave Taylor (Respondents) v. Domglas Inc. (Intervener) (*Dismissed*)

1678-86-U: Hyacinth Davidson (Complainant) v. R.W.D.S.U., Local 414 (Respondent) (*Dismissed*)

1841-86-U: Sheet Metal Workers' International Association, Local 575 (Complainant) v. Carrier Canada Limited (Respondent) (*Withdrawn*)

1847-86-U: United Steelworkers of America (Complainant) v. Renfrew Tape Ltd. (Respondent) (*Withdrawn*)

1860-86-U: Canadian Union of Public Employees and its Local 161 (Complainant) v. Laurentian Hospital (Respondent) (*Withdrawn*)

1865-86-U: London & District Service Workers Union, Local 220 (Complainant) v. Murphy Manor (Respondent) (*Withdrawn*)

1915-86-U: Ernest Farmer (Complainant) v. Sheet Metal Workers' International Association, Local 562 and Thackeray Roofing & Sheet Metal Company Limited (Respondents) (*Withdrawn*)

1916-86-U: The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Complainant) v. Victory Plumbing Inc. (Respondent) (*Withdrawn*)

1953-86-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. F. Causarano Fishery Limited (Respondent) (*Withdrawn*)

1975-86-U; 1976-86-U: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Complainant) v. Egan Visual Inc. (Respondent) (*Withdrawn*)

2049-86-U: Service Employees Union, Local 183 (Complainant) v. Hooper's Catering & Restaurant (Respondent) (*Withdrawn*)

2078-86-U: Laundry & Linen Drivers & Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Walker Atlantic Glass Co. Ltd. (Respondent) (*Withdrawn*)

2092-86-U: United Food & Commercial Workers Union, Local 409 (Complainant) v. E. M. D. Hardware (Home Hardware, Dryden) (Respondent) (*Withdrawn*)

2118-86-U: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders International Union (Complainant) v. Brockton Hotel (Respondent) (*Withdrawn*)

2158-86-U: Terry Barkley (Complainant) v. Labourers' International Union of North America (Respondent) (*Withdrawn*)

2196-86-U: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Edwards Steel Fabricators Inc. (Respondent) (*Withdrawn*)

2206-86-U: Shirley Lynch (Complainant) v. Mr. Bob Sleva, Union Rep. (Respondent) (*Withdrawn*)

2216-86-U: Steven Peter Chomiak (Complainant) v. CAE Webster Mfg. (Respondent) (*Dismissed*)

2221-86-U: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Complainant) v. Barrymore Carpets (Respondents) (*Withdrawn*)

2236-86-U: The United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Complainant) v. Ken Mar Doors Ltd. and Mr. Kenneth Collins (Respondent) (*Withdrawn*)

2239-86-U: The Electrical Power Systems Construction Association and Ontario Hydro and Gilbert Steel Limited (Complainants) v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 721, George Joncas, Alfie Thomas, John Donaldson & Aaron Murphy (Respondents) (*Withdrawn*)

2276-86-U: United Food & Commercial Workers International Union, CLC-AFL-CIO (Complainant) v. SAAN Stores (Respondent) (*Withdrawn*)

2295-86-U: United Food & Commercial Workers International Union Local 633 (Complainant) v. Morrison's Meat Packers Limited (Respondent) (*Withdrawn*)

2318-86-U: Ontario Public Service Employees Union (Complainant) v. Craigwood Youth Services (Respondent) (*Withdrawn*)

2345-86-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. S. Catrini Fisheries Inc. (Respondent) (*Withdrawn*)

2380-86-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 326 (Complainant) v. Uniflex Packaging of Canada Limited (Respondent) (*Withdrawn*)

2412-86-U: Dennis Samms (Complainant) v. C. P. Express & Transport (Respondent) (*Dismissed*)

2416-86-U: Ontario Nurses' Association (Complainant) v. The Victorian Order of Nurses, Sudbury Branch (Respondent) (*Withdrawn*)

2426-86-U: The Ontario Public Service Employee's Union (Complainant) v. City of Timmins (Respondent) (*Withdrawn*)

2427-86-U: Al Jubinville (Complainant) v. Lumber & Sawmill Worker's Union, Local 2693 (Respondent) (*Withdrawn*)

2476-86-U: Arthur Edwards (Complainant) v. Ontario Hydro, International Union of Operating Engineers Local 793 (Respondents) (*Withdrawn*)

2479-86-U: Kim Laura Crowe (Complainant) v. Hotel Employees & Restaurant Employees Union, Local 75

of the Hotel Employees & Restaurant Employees International Union AFL-CIO-CLC, OFL (Respondent) (*Withdrawn*)

2492-86-U: Rocco Lapico (Complainant) v. Retail, Wholesale & Department Store Union, Local 582 (Respondent) (*Withdrawn*)

2498-86-U: The International Association of Machinists & Aerospace Workers, District Lodge 717, I.A.M. & Technical Associates Lodge 1922, I.A.M. (Complainants) v. Hawker-Siddeley Canada Inc. (Orenda Division) (Respondent) (*Withdrawn*)

2536-86-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Cancoil Thermal Corporation (Respondent) (*Granted*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1971-86-R: David Edward Armer (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent Trade Union) v. Brink's Canada Ltd. (Respondent Employer) (*Dismissed*)

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Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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BEFORE: *Harry Freedman*, Vice-Chairman.

APPEARANCES: *David Cote, David Turner, Jorma Vainio and Ron Maricotte* for the applicant; *L. Steinberg and A. Verners* for the respondents.

DECISION OF THE BOARD; February 23, 1987

1. The Board issued the following decision orally at the conclusion of its hearing in this matter on February 19, 1987:

This is an application under section 135 of the *Labour Relations Act* arising out of a conversation between the applicant's project manager, Jorma Vainio and the respondent Arthur Verner, who is the business representative and financial secretary of the respondent Local 1671.

The applicant is a general contractor that is engaged in a construction project at Kapuskasing. It is not bound by a collective agreement with the respondent union, although it is bound by collective agreements with the carpenters' union and the labourers' union.

Starting February 23, 1987 the applicant will be using a painting contractor that is not in contractual relations with the respondent union or any of its affiliated unions.

On February 10, 1987, Mr. Verner went to the applicant's job site in Kapuskasing to investigate the work that was being performed. When he was advised by Mr. Vainio that the applicant was going to be using a non-union sub-contractor to do painting work, Mr. Verner objected and indicated to Mr. Vainio that if the applicant used a non-union sub-contractor, there would be an information picket line and that he, Mr. Verner would be on it.

Mr. Verner testified that he made the statements attributed to him by the applicant's witnesses. He also testified that he did not really have any intention to set up such an information line. In the 14 years as business representative of the respondent union, he has only been involved in one information picket line.

Relief under section 135 is discretionary. In this case, the *only* conduct that can give rise to the relief sought are the statements of Mr. Verner on February 10, 1987. Those kinds of statements have not been made to the applicant since then and nothing more has been done to carry through with them.

The applicant not only seeks a remedy enjoining any further threats, but also wants an order enjoining picketing.

Mr. Verner testified that he made the statements because he was angry. While I have some doubts about Mr. Verner's testimony in that regard, I am satisfied that he has not done anything since February 10, 1987 to have an information line or a picket line established at the applicant's project in Kapuskasing. Furthermore, I accept Mr. Verner's testimony given under oath that he did not have and does not now have any intention of setting up an information line or a picket line there. Therefore, I am not persuaded that there is a real or strong likelihood that picketing will occur so that the Board should exercise its discretion to grant, in effect, *quia timet* relief in respect of picketing. See paragraph 11 of *Maitland Ready Mix Concrete Products Limited*, [1980] OLRB Rep. Dec. 1751 where the Board stated at 1754:

"The application for relief is, in the Board's view, premature and may be compared to a request for an injunction *quia timet* before the courts. Injunctions *quia timet* are not granted by courts unless a plaintiff shows a strong case that the apprehended mischief will in fact arise, see *Cheeseworth v. Toronto* (1921), 49 O.L.R. 68 and *Matthew v. Guardian Assurance Company* (1919), 58 S.C.R. 47, and that the mischief, when it comes, will be very substantial, see *Fletcher v. Bailey* (1885), 28 Ch. D. 688. ...

Statements by the respondents that a picket line would be set up do not persuade the Board that an unlawful strike will occur at the site. The mere apprehension by the applicant that a picket line might be set up which in turn might lead to an unlawful strike is not sufficient, on the facts before the Board, to entitle the applicant to the granting of discretionary relief under either section 82 or section 123."

As for relief with respect to the statements made by Mr. Verner, those isolated statements have not prompted any further conduct and there have not been any subsequent statements of a similar nature made. In my opinion, these circumstances are analogous to situations in which an applicant seeks a cease and desist order before the Board in respect of an unlawful strike when the strike is over at the time of the hearing before the Board. I am not persuaded that it is likely that Mr. Verner or the respondent union will make such statements to the applicant in the future, and there is absolutely no suggestion that there is a history of such statements being made. In these circumstances, the Board does not exercise its discretion to grant the relief requested. See *Bechtel Canada Limited*, [1977] OLRB Rep. May 269 at 273; *Ontario Hydro*, [1985] OLRB Rep. April 577.

Therefore, the Board hereby refuses to exercise its discretion under section 135 of the Act to grant any remedy. This application is hereby dismissed.

2797-86-R Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **All Type Metal Stamping Limited**, Respondent, v. Group of Employees, Objectors

Certification - Membership Evidence - Employee objectors submitting that 55.3 percent membership support not "more than 55 percent" as described in s.7(2) - Board treating any fraction of a percentage over 55 as sufficient for automatic certification - Board declining to direct a representation vote - Certificate issuing

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *I. M. Stamp* and *D. A. Patterson*.

APPEARANCES: *Eric del Junco*, *Darrell Hunt* and *Jim O'Donnell* for the applicant; *Michael Failes*, *J. Fennema* and *Helen Donaldson* for the respondent; *Michael Horan* and *Theo Nederloff* for the objectors.

DECISION OF THE BOARD; February 23, 1987

1. This is an application for certification in which the parties met with a Board Officer prior to the hearing scheduled in this matter, reached agreement on all matters in dispute between them and agreed to waive their right to a formal hearing in the matter, except as is noted below.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Although at the time of the hearing before the Board, and the meeting with the Board Officer, the parties were not in agreement with respect to the appropriate bargaining unit description, they were subsequently able to reach complete agreement on such bargaining unit description. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Stoney Creek, save and except supervisors, those above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board notes that the parties have agreed that Theo Nederloff and Jake Vandellen are excluded from the above described bargaining unit.

5. During their meeting with the Board Officer, the membership evidence submitted by the applicant was considered, along with the petition submitted on behalf of the employee objectors. The parties were advised that, if the Board ultimately found the petition to be voluntary, the applicant would still be in a position where over fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, and as of the terminal date, would still have wanted the applicant to represent them. Specifically, the parties were advised that, in the event the petition was voluntary, the applicant still enjoyed membership support of 55.3 per cent of those employees in the described bargaining unit.

6. Based on these numbers, a hearing was convened in order to entertain the submission of the employee objectors that 55.3 per cent membership support was not "more than 55 per cent" as described in section 7(2) of the Act. In counsel's submission, in order for the Board to have the jurisdiction to automatically certify an applicant union, the union must enjoy one full percentage

point more than 55 per cent. Counsel for the employee objectors was not asking that the Board reconsider the position it took in *St. Hubert Bar-B-Q*, [1982] OLRB Rep. Jan. 122, where the Board found that, for purposes of automatic certification pursuant to section 7(2) of the Act, it was not necessary that the union demonstrate it had the support of one full employee beyond the number of employees necessary to make up 55 per cent of the bargaining unit in question. Counsel before the panel in instant case submitted only that one full percentage point, or 56 per cent at least, was necessary in order for automatic certification, as was implicit from the wording of section 7(2) of the Act.

7. The Board ruled orally at the hearing that 55.3 per cent was sufficient for purposes of automatic certification pursuant to section 7(2) of the Act and the Board declined to read that section as urged upon it by counsel for the employee objectors. "More than 55 per cent" means any fraction of a percentage more, and cannot be read to mean 56 per cent. Apart from the Board's interpretation of section 7(2), the Board indicated that the Board's universal and longstanding practice had been to treat any fraction of a percentage over 55 as sufficient for purposes of section 7(2). The Board felt that such an approach was sensible, in accord with the legislation, past practice, and the promotion of labour relations harmony.

8. Counsel for the employee objectors also argued that the Board should exercise its discretion under subsection 7(2) of the Act to direct a representation vote, rather than automatically certifying the applicant, notwithstanding the fact that the Board had found that the applicant enjoyed more than 55 per cent support. Counsel argued that, approximately one week before the instant application was filed, three automobiles had been vandalized in the company parking lot. In turn, this property damage had had an intimidatory effect on employees in the bargaining unit, so that when the petitioner approached employees to sign the petition, some had indicated that they did not want to be involved and they were taking a "hands off" position. In light of the vandalism, and the intimidating effect it might have had on some employees, and in light of how close to 55 per cent the applicant support was, counsel urged that a representation vote be held.

9. Assuming the truth of these allegations and that the employee objectors could prove such matters in evidence, the Board nevertheless declined to exercise its discretion to order a representation vote. There was no suggestion as to who might have caused the automobile damage, nor any concrete examples linking such damage to the unwillingness of employees to become involved. In any event, the Board considered the events and any causal relationship between them and the collection of signatures on the petition too remote to be grounds to order a vote, or to substantiate any chilling effect. In the circumstances, the Board declined to direct a representation vote.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 22, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

0403-86-R; 0754-86-U Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 172, Applicant, v. **Belair Restoration (Ontario) Inc.**, Respondent, v. Group of Employees, Objectors; Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172, Complainant, v. Belair Restoration (Ontario) Inc., Respondent

Certification - Construction Industry - Membership Evidence - Petition - Inexperienced union organizer "loaning" dollar to two employees when they signed membership cards - Loans not disclosed on Form 80 - History of how Board has dealt with non-pay problems reviewed - No intention to repay money - Loans not bona fide - Failure to disclose loans on declaration causing Board to disregard remainder of membership cards filed despite inexperience of union organizer - Certification dismissed

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *C. A. Ballentine*.

APPEARANCES: *Anthony J. Wice, J. J. Marchildon, Casey J. Matciw* and *Paul Falzone* for the applicant/complainant; *Joseph Liberman* and *Dennis Daigle* for the respondent; *Harold MacKay, Denis Connolly, Jack Charron* and *Issac Langs* for the group of employees.

DECISION OF THE BOARD; February 26, 1987

1. The name of the respondent in Board File No. 0403-86-R is amended to read: "Belair Restoration (Ontario) Inc.".

2. File No. 0403-86-R is an application for certification made under the construction industry provisions of the *Labour Relations Act*. There were four individual statements opposing the application filed by persons purporting to be employees of the respondent Belair Restoration (Ontario) Inc. (hereinafter "Belair"). File No. 0754-86-U is a complaint filed under section 89 of the Act alleging that Belair has violated sections 64, 66(c), 70 and 79 of the Act. In a schedule to the complaint the complainant Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 172 (hereinafter "Local 172") requests that it be certified as bargaining agent pursuant to section 8 of the Act without the need of a representation vote in the event that the Board finds Local 172 not to have sufficient employees of Belair as its members in order to be certified without a representation vote. The application and complaint were listed together for hearing by the Board.

3. At the hearing, the parties could not agree whether the two files should be consolidated. Applicant counsel wanted to wait until it could be determined whether it was necessary to hear evidence with respect to the origin and circulation of the four statements in opposition to the application, and if so, until that evidence was heard, before deciding the issue of whether the two files should be consolidated. The Board ruled that it would proceed with the application for certification to the point where, if possible, the Board could determine whether the petition was numerically relevant. That is, determine whether a sufficient number of employees for whom Local 172 had submitted evidence of membership had also signed the statements so as to raise doubt whether the applicant continued to enjoy the support of a majority of Belair's employees who were also members of Local 172. As a result of the Board's ruling, this decision deals only with the application for certification.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p)

of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on May 30, 1978, the designated employee bargaining agency is the Operative Plasterers and Cement Masons International Association of the United States and Canada and the Ontario Provincial Conference of the Operative Plasterers and Cement Masons International Association of the United States and Canada.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117 (e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in masonry restoration work, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. Belair filed lists of employees containing a total of ten names of persons whom it contends are employees in the bargaining unit described above. Counsel for Local 172 contends that three of the persons included on the lists were not employees of Belair at work in the bargaining unit on the date of making of the application. These persons are D. Burns, G. MacNeil and A. Watt. Since the parties could not resolve their dispute, the Board advised them that it would not reveal the details of the membership evidence filed by Local 172 but, whether the Board determined that there were seven employees or ten employees in the unit, the four statements of desire would be relevant. In these circumstances, the Board ruled and the parties agreed that the Board should proceed to hear the evidence respecting the circumstances surrounding the origin and signing of the four statements.

8. The Board heard the evidence of Denis Connolly and Harold MacKay, two of the four objectors, before it was necessary to adjourn the hearing. Connolly was acting as spokesman for the four employees and testified first. In the course of MacKay's testimony, he described for the Board the circumstances under which he had signed an application for membership in Local 172. These were that, when he was asked by Casey Maticiw if he wanted to join Local 172, he told Maticiw that he did not have a dollar, whereupon Maticiw offered to lend him a dollar, took a dollar from his wallet and said "you're in". MacKay stated that he never gave Maticiw a dollar and

Maticiw never gave a dollar to him. When applicant counsel examined MacKay, he asked him what words Maticiw had actually used. MacKay replied that, after he had told Maticiw that he did not have a dollar and before he had signed the application for membership, Maticiw asked him if he wanted a dollar. When MacKay replied "yes", Maticiw said "you owe me a dollar".

9. Following the hearing, as a result of MacKay's testimony, the Board had one of its officer's conduct a preliminary investigation into these circumstances. In the course of his investigation, the Board Officer took a signed statement from Jack Charron, another of the objectors. His statement conflicted with the information on the membership card filed on behalf of Charron with respect to the payment of money for dues or initiation fees in the union. At that point, the Board had Charron's signed statement and MacKay's viva voce evidence that they had not personally paid any money in the form of dues or initiation fees to Local 172. Those circumstances led the Board to proceed in accordance with its well established practice in such situations. It summoned Charron, MacKay and Maticiw to a hearing for the purpose of "...inquiring into the circumstances surrounding the payment of the required membership fee by [MacKay and Charron],...". Maticiw was summoned because he had signed and filed with the Board on behalf of Local 172 the Form 80 "Declaration Concerning Membership Documents, Construction Industry" (hereinafter "the Declaration" or "the Form 80") in support of the individual membership cards filed by Local 172.

10. The three parties were given notice of the hearing and, by that notice were notified that the three persons had been summoned for the purposes of the inquiry. In hearings held for these purposes, the Board will conduct a formal inquiry into the particular issue by questioning each of the summoned persons, will afford each party an opportunity to question them, to adduce additional evidence and to make submissions to the Board on the evidence and relevant law. The Board followed this procedure at its hearing in the instant case on February 16, 1987, and heard the testimony of Charron, MacKay and Maticiw. On the conclusion of their testimony, no other evidence was adduced by the parties and the Board heard their full submissions on the evidence and relevant law.

11. Prior to the February 16th hearing, it had been necessary to adjourn several earlier hearing dates. As a result, seven and a half months had elapsed since the first hearing. All of the membership documents filed by Local 172 are in the form of combination applications for membership in the union and acknowledgments that one dollar was paid by each applicant employee, to employ the words of the acknowledgment which is part of the membership document, "...as evidence of good faith in [his/her] application for membership..." in the union. Charron's and MacKay's applications for membership were signed May 8, 1986. The Board is satisfied that all three witnesses made sincere attempts to describe accurately to the Board their recall of the circumstances surrounding the required payment by Charron and MacKay of at least one dollar in dues or initiation fees. The Board's conclusions of fact and law herein have been made based on its review of their evidence, the submissions thereon of counsel for the parties and the Board's relevant jurisprudence.

12. When Charron told Maticiw that he did not have the money with him to pay one dollar with his application for membership in the union, Maticiw gave Charron the dollar membership fee and, in turn, Charron gave it back to Maticiw when Charron signed the membership application. This all took place at the same time. No arrangement was made at the time for Charron to repay the dollar and none was made up to and including the hearing on June 30, 1986. Charron repaid the dollar on July 29, 1986.

13. MacKay's evidence given on the first day of hearing was unchanged by his testimony on February 16, 1987. On that evidence, although money did not pass between MacKay and Maticiw,

the Board finds that Maticiw did lend MacKay the dollar by which he purportedly was showing his good faith in applying for membership in Local 172. There is no direct evidence that, at any time between May 8, 1986, when MacKay signed his application for membership and the June 30th hearing, MacKay and Maticiw made or did not make any arrangement for MacKay to repay Maticiw. It is reasonable to infer, however, from all the evidence before the Board, that no arrangements were made for MacKay to repay the dollar when he signed the application for membership or at any time before he testified at the June 30th hearing. MacKay also repaid the dollar on July 29, 1986.

14. Maticiw was employed by Local 172 as a full-time organizer and business agent in March, 1987. He had no prior experience organizing for a trade union. His campaign to organize Belair's employees was his first one. When Charron and MacKay told him that they did not have the money to pay the dollar for their applications for membership in Local 172, he told them that he could see nothing wrong with him lending them a dollar for the purpose of them making applications for membership in the union. Their applications, together with those of other employees, which Local 172 filed with the Board were supported by the Form 80 Declaration which Maticiw signed and filed with the Board on May 28, 1986. Paragraph 3 of the Declaration says:

3. *(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees)* On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, **EXCEPT IN THE FOLLOWING INSTANCES:**

No exceptions to the paragraph 3 statement are noted on the form. Maticiw told the Board that he had not noted any exceptions because there were none. According to Maticiw, since MacKay and Charron had paid the one dollar acknowledged on their membership applications with money borrowed from him, they had effectively paid with their own money. Thus, in his mind, it was not as though he had paid the one dollar for them. He gave the same reason in explaining why he saw no need to have them repay the dollar before the terminal date set for the application. That is the date when Local 172 had to have its membership cards filed. The Declaration had to be filed on or before the second day after the terminal date.

15. It may be inferred from all the evidence before the Board that, between May 8th and June 30th, 1986, Maticiw did not ask either MacKay or Charron to repay his loan. He realized the loans might be a problem for the union only after MacKay's testimony on June 30, 1986. Even so, he waited a further month before asking for repayment. This was because he anticipated that they would resist any attempt by him to collect the loans, since their attitude had changed from one of supporting the union to one of opposing it.

16. The statutory definition of a trade union member in section 1(1)(l) of the Act includes a person who has both applied for membership in the trade union and also paid to the trade union on his own behalf at least one dollar. The wording of the section was introduced into the Act in 1970 by *The Labour Relations Amendment Act, 1970*, S.O. 1970, c. 3. It codified a 20 year old Board policy which provided that, in order for the Board to consider an employee to be a member of a trade union, the employee must not only have applied to become a member of the union, but also must have paid to the union on his own behalf at least one dollar. The Board's decision in *RCA Victor Company, Ltd.*, 53 CLLC ¶17,067 at pp. 1469-70 describes the purpose of requirement of the money paid as follows:

It need hardly be pointed out that the Board cannot accept as evidence of payment anything in the nature of a monetary contribution from a person other than an applicant for membership. The money payment constitutes confirmatory evidence of the desire of the payer to become a member of the trade union. If no financial sacrifice is made by the person himself, the only evidence submitted on his behalf is a signature on an application card which the Board has long since held to be inadequate to establish membership. On the other hand, not every loan to a prospective member, especially where the money is repaid, will be fatal to an applicant's case.

17. More than 30 years have passed since that decision of the Board and it is still dealing with the problem of whether a person applying to be a member of a trade union who makes a payment of at least one dollar with money borrowed for that purpose has satisfied the statutory definition of trade union membership. That very issue was before the Board in its decision in *Laidlaw Wire of Canada, Ltd.* [1985] OLRB Rep. Oct. 1479, with respect to an employee who had borrowed a dollar from another employee in order to pay the dollar required with her application for membership in the trade union which was seeking certification in that case. The two employees were brother and sister. The collector assumed that the sister had borrowed the money from her brother and immediately told both of them to be sure that the loan was repaid. It was repaid later the same day. The collector reported the incident to the union official who subsequently signed the Declaration. The incident was not referred to on the Declaration because, in the declarant's opinion, there was "no exception" to paragraph 3 since the employee who had borrowed the money had paid one dollar on her own behalf. Neither the collector nor the declarant had confirmed with either the lender or the borrower before filing the Declaration that the loan had been repaid. The respondent to the application contended that, not only should the Board reject the borrower's membership card on the grounds that she had not paid one dollar on her own behalf, but failure to disclose the loan on the Declaration was a serious breach of the Board's practice and procedure which should cause the Board either not to rely on the applicant's evidence at all or to seek confirmation of the employees' support for the applicant in a representation vote.

18. The Board's decision in that case is helpful because it sketches some of the history of how the Board has dealt with this sort of problem. The relevant parts of the decision begin at paragraph 22 immediately after the Board has quoted the passage set out above from the *RCA Victor* decision:

22.

• • •

For a number of years, the Board tended to treat such transactions as being tantamount to "non-pays", particularly where the money was advanced by a trade union official and where the "loans" were not repaid prior to the filing of the membership cards with the Board: see, for example, *Webster Air Equipment Company Ltd.*, 58 CLLC 1810; *Hershey Chocolate of Canada, Limited*, [1963] OLRB Rep. May 73; and *Tillsonburg Shoe Co.*, [1964] OLRB Rep. June 142. However, as early as 1958 (in the *Webster Air Equipment* case, *supra*) the Board indicated that it was "not greatly concerned about isolated instances of money being advanced by one employee to another", in recognition of the fact that such a transaction might well be an incident in an established relationship between two employees where one, knowing and trusting the other, accommodated him by lending him a dollar during a period when he was short of funds. Nevertheless, the Board went on to note in that case that a union acts at its peril in failing to make full disclosure or all material facts where "a loan is made by [a responsible] officer or official [of the union] and the money is not repaid before the hearing, or where there is a pattern of loans having been made, whether by such a person or by rank and file employees, and whether repaid or not".

23. More recent cases have tended to focus on whether the impugned transaction constituted a *bona fide* loan which the borrower sincerely intended to repay. In *Sandercock Construction Limited*, [1970] OLRB Rep. Apr. 147, the Board discounted membership cards submitted in

respect of two employees who had each “borrowed” a \$10.00 initiation fee from another employee without any real intention to repay the “loans”, and had only repaid them “because of further proceedings before the Board”. In *St. Thomas Sanitary Collection Service Limited*, [1972] OLRB Rep. June 600, the Board wrote, in part, as follows:

4. In this case there were certain allegations of non-pay made. The Board accordingly conducted its usual investigation and subsequently a hearing was ordered. The evidence revealed that at the time Clarence Earhart signed an application for membership in the applicant union he did not have a dollar and requested a fellow employee to loan him a dollar and indicated that he would repay the dollar. The collector was another fellow employee. Mr. Earhart intended to repay the money that was loaned to him; however, he stated that when he saw the fellow employee he did not have the money, but when he had the money he did not see him. He further indicated that he felt he was obligated to repay the dollar.

5. It further appeared that the person who signed the form on behalf of the union made the appropriate inquiries of the employee collector and accordingly there is nothing improper about the filing of the [Declaration] in this matter.

6. We are satisfied in the circumstances of this case that a *bona fide* loan was made by one employee to another employee, and we do not find anything improper in the evidence of membership submitted: *Skene Cartage Company Limited*, [1966] OLRB Rep. 30.

In *N. A. Construction*, [1982] OLRB Rep. Jan. 77, the Board gave no weight to membership evidence filed on behalf of two employees who, in the presence of the collector, each “borrowed” a dollar from a third employee without any intention of repaying him. In reaching that conclusion, the Board took into account “the fact that the ‘so-called’ loans were made in an informal manner in front of the collector who made no attempt to ascertain whether in fact there was a true intent to repay the money”. (The Board also took into account the fact that the collector actually received the money from the third employee.) In *Shaw Festival Theatre Foundation, Canada*, [1983] OLRB Rep. Sept. 1579, the Board was called upon to determine the membership status of an employee who borrowed \$25.00 from the secretary of the local because the employee did not have enough money to pay the required initiation fee at the time he was approached by that union official and asked to join the local. In finding that employee to be a member of the local for the purposes of the local’s certification application even though the loan had not been repaid as of the date of the hearing, the Board accepted the employee’s testimony that he was obligated to repay the loan and intended to do so. Thus, the Board found the loan to be “a *bona fide* transaction”.

24. Having carefully considered the submissions of the parties in the light of the applicable jurisprudence, the Board has concluded that Manjit Krod was a “member” of the applicant within the meaning of section 1(1)(1) of the Act, at the pertinent time for purposes of this application. Under the circumstances, there can be no doubt that the loan which she received from her brother was a *bona fide* transaction. In this regard, we note that at the time of the transaction, there was a clear understanding between Ms. Krod and her brother that she would repay the dollar to him at home later that day. Having quite properly refused to accept payment from Jaswinder Manak on behalf of his sister. Mr. Harkins, who correctly assumed that the money which Ms. Krod paid to him had been loaned to her by her brother, told Ms. Krod and Mr. Manak to be sure that the loan was repaid. Thus, unlike the collector in *N. B. Construction*, *supra*, Mr. Harkins did take steps to assure himself that Ms. Krod intended to repay the loan to her brother. Moreover, the loan was in fact repaid later that day in accordance with the arrangements which had been made at the time of the transaction.

25. As conceded by counsel for the applicant, it would have been prudent to have mentioned in the ... Declaration the loan from Jaswinder Manak to Manjit Krod. Inclusion of that information in the Declaration might have obviated the need for a formal inquiry into the transaction, or at least have enabled the Board to investigate it more quickly. However, Mr. Nicholson’s decision to not include that information in the Declaration was, at most, an error in judgment which was not intended to, and did not in fact constitute a fraud or misrepresentation, since, in view of the *bona fide* loan described above, Ms. Krod had in fact paid, on her own behalf, an

amount of one dollar to Mr. Harkins in respect of initiation fees. Thus, the transaction did not constitute an exception to the statement contained in paragraph 3 of the Declaration.

...

19. The Board in that case concluded that the loan between the two employees was a *bona fide* one because, in major part, there was a clear understanding between the two employees that the borrower would repay the lender, the collector took steps to assure himself that the borrower intended to repay the loan, and the loan was in fact repaid later that day in accordance with the arrangements which had been made at the time of the transaction. Since the Board was satisfied with the *bona fides* of the loan, it was able to conclude that the employee who had borrowed the dollar had personally paid a dollar on her own behalf to the collector for the union. Therefore, the circumstances of the payment were not an exception to paragraph 3 of the Declaration and failure to make reference to those circumstances, to quote the decision, "...did not in fact constitute a fraud or a misrepresentation, ..." with respect to the Declaration.

20. The Board's decision in *Laidlaw, supra*, and the cases cited therein, stand for the proposition that an employee who has borrowed a dollar in a *bona fide* loan transaction and tendered it in support of an application for membership in a trade union has made a payment on his own behalf. Whether a particular loan is a *bona fide* one will always turn on the factual circumstances in which the loan is alleged to have been made.

21. On the facts of the instant case, the Board is not satisfied that there was a *bona fide* loan between Maticiw and MacKay or Maticiw and Charron. It is clear from the Board's cases referred to above that the intent to repay the borrowed money is a critical element for a loan to be considered *bona fide* by the Board for purposes of satisfying the statutory definition of member and membership. There was no intent on the part of MacKay and Charron to repay the one dollar advanced by Maticiw. Nor did Maticiw make any arrangements at the time he made the loans, prior to signing and filing the Declaration with the Board or up to the June 30th hearing, for them to repay the loans. The Board finds support for this conclusion in the fact that Maticiw made no attempt to have the loans repaid at any time between May 8, 1986, when they were made and July 29, 1986, when they were repaid, not even after he became aware on June 30th that the loans might pose a problem with respect to Local 172's membership evidence. His conduct is inconsistent with him having obtained from the two employees a firm commitment to repay their loans or with him intending to have them repaid. Therefore, in light of the absence of any attempt by Maticiw to collect the loans and coupled with the fact that there were no repayment arrangements established at the time of the loans right up to the June 30th hearing, the Board is not satisfied that the loans were made with the necessary intent that they be repaid. In the result, the Board finds that MacKay and Charron have not paid at least one dollar respecting dues or initiation fees of Local 172 and, therefore, were not members of Local 172 at the time this application for certification was made.

22. The remaining question is whether the failure to disclose the loans on the Declaration should cause the Board to not rely on the remainder of the cards filed by the applicant in support of its application for certification. The significance of the Declaration and the importance of complete disclosure by the person making the declaration for the applicant trade union was expressed by the Board in its decision in *Zehr's Markets Limited*, [1972] OLRB Rep. June 635 at paragraphs 4 and 5:

4. There are a number of cases before this Board dealing with [the Declaration]. Those cases indicate that the Board has exacted very stringent standards from applicants who submit membership evidence. These stringent requirements are necessary because the membership evidence or records of trade unions relating to membership fall within the secrecy requirements of section

100 of The Labour Relations Act. Other parties to a certification proceeding do not have the opportunity to examine the membership evidence nor in the usual case do the parties have the opportunity to cross-examine witnesses with respect to the membership evidence. It is in those circumstances that the Board approaches its statutory responsibility under section 7 of the Act and accordingly is extremely vigilant in ensuring the propriety of membership evidence. Since the Board must rely on the evidence of membership tendered by the applicant trade union the Board has exacted strict requirements from applicant trade unions with respect to that membership evidence and particularly with the Declaration Concerning Membership Documents....

5. The Declaration, ..., "goes to the very root of the membership evidence submitted by the applicant". *Canadian Union of Operating Engineers. v. The Stanley Steel Company Limited v. United Steelworkers of America* [1972] OLRB Rep. Feb. 181; and the cases before this Board have indicated that there must be compliance with the requirements of [the Declaration] and complete disclosure must be made. See E. G., *Stanley Steel Company Limited*, supra; *United Steelworkers of America v. National Steel Car Corporation Limited* [1966] OLRB Rep. Dec. 738; *Valley Transportation Company Limited* [1963] OLRB Rep. Nov. 448; *Retail, Wholesale and Department Store Union, AFL:CIO:CLC v. Dominion Stores Limited* [1964] OLRB Rep. Dec. 447; *International Association of Machinists v. Essex Wire Corporation Limited v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, affiliated with the I.B. of T.C.W. & H. of A.* [1965] OLRB Rep. Oct. 490; and where compliance with the directions of [the Declaration] and the standards of accuracy and disclosure contained therein were not met the Board has invariably found that there is not sufficiently reliable evidence concerning membership documents.

Some nine years earlier in its decision in *Holland River Gardens Company Limited*, [1963] OLRB Rep. Oct. 364, the Board expressed at page 366 a similar view of the significance of the Declaration Concerning Membership Documents and the extent to which the Board must rely on it:

It is obviously a practical impossibility for the Board to interview each employee on whose behalf documentary evidence of membership is filed in a certification application. The Board accordingly must place heavy reliance on the statements contained in [the Declaration] which it accepts at face value. Since the Board is compelled to rely to such an extent on [the Declaration] in considering the adequacy of the evidence of membership submitted by the applicant, any failure to make full disclosure of all the material facts must weigh heavily against the applicant. (See *Webster Air Equipment Co. Ltd. Case*, CCH C.L.L.R Transfer Binder '55-'59 ¶16,110, C.L.S. 76-598.)

...

The decision involves a case in which a paid organizer of the applicant trade union had signed as collector on two cards when in fact another person was the collector. The organizer did not reveal this fact to the official of the applicant trade union who signed the Declaration supporting its membership documents. The Board had this to say at pages 366 and 367 about those circumstances and their effect on the reliability of the applicant's membership evidence:

5. ... Although in the instant case the evidence is that the signatory to [the Declaration] did not have knowledge with respect to the two cards in question, the seriousness of the non-disclosure of the true situation in [the Declaration], in our opinion, is in no way alleviated. As a responsible paid organizer of the applicant, Wedge's actions with regard to securing evidence of membership must be treated as the acts of the applicant. His misdeed lies not only in signing as collector, but more important in his failure to make full disclosure of the facts to the Board. While we do not believe that Wedge mislead the Board by design, we cannot treat his non-disclosure merely as an oversight.

While stating that we do not find that the applicant deliberately attempted to mislead the Board, the consequences flowing from the applicant's actions could have no other result. It is of concern to the Board that it only became aware of the true situation as a result of making its own inquiry into a discrepancy with respect to a signature appearing on a membership application card filed by the applicant. While we have no evidence before us of any other irregularities with

respect to the evidence of membership, in previous decisions the Board has refused to accept any of the evidence of membership where a single defective card has been submitted to the knowledge of a responsible union official. (See *R.C.A. Victor Company Limited Case*, CCH C.L.L.R. Transfer Binder '49-'54 ¶17,067, C.L.S. 76-412). In all the circumstances of this case the Board is not prepared to place reliance on any of the evidence of membership filed by the applicant.

23. Maticiw was the collector on all of the cards filed in support of the application for certification as well as the declarant on the Form 80 Declaration. Like the declarant in *Laidlaw*, Maticiw did not refer to the loans in his declaration because he was of the opinion that they were not an exception to the statement in paragraph 3. This was because, in his view, he had made a loan to MacKay and Charron and at that point it was as though they were tendering their own money. Therefore, they had, in the words of paragraph 3, "...personally paid in money the amount shown..." on the receipt or acknowledgment. It may be seen from the quotation from paragraph 25 of the *Laidlaw* decision, *supra*, that the Board, although critical of the declarant's judgement in not revealing the loan, agreed with him, in the circumstances of the case, that the payment in issue was not an exception to the paragraph 3 statement. It is patently clear from the decision that the Board came to that conclusion because, even though the employee had made payment with borrowed money, it was borrowed with the clear intent of repaying the money. In that case, it was repaid the same day. Those are not the factual circumstances of the instant case. The Board herein has found that no arrangements had been made by Maticiw at any time prior to July 29, 1986, for MacKay and Charron to repay the loan. Therefore, there had been no intent by them at the time the loan was made to repay it and no express intent of Maticiw that it be repaid. Thus, the loans were not *bona fide* ones in the context of the Board's jurisprudence. Those were the circumstances existing on May 28, 1986, when Maticiw signed and filed the Declaration on behalf of Local 172.

24. Even if the Board assumes, without finding, that Maticiw did not intend his declaration to mislead the Board as to the precise circumstances in which payment of money respecting dues or initiation fees was made by those persons for whom the applicant was submitting membership documents of the type referred to in paragraph 3 of the Declaration, the effect of his failure to identify the two exceptions has been to mislead the Board as to the circumstances under which payment was submitted with respect to those two cards. As in the *Holland Farms* decision, *supra*, these facts only came to light through the Board's inquiry into the petition and then through the Board making its own further inquiry into the circumstances under which MacKay and Charron signed their membership applications. The Board's strict standard respecting the quality of membership evidence as set out in decisions like *Holland Farms* and *Zehr's*, and the Board's jurisprudence which has consistently expressed the consequences of failure to comply with the Board standard, are well known in the labour relations community. The fact that this was Maticiw's first organizing campaign for Local 172 does not alter the consequences for Local 172 of his acts or omissions. If its responsible officials fail to properly instruct its organizers, or if the organizers fail to follow instructions, Local 172 must bear the consequences.

25. Therefore, in all the circumstances of this case, the Board is not prepared to give any weight to Local 172's membership cards because of the misleading Declaration filed in support of those cards.

26. The application for certification is dismissed.

27. With respect to the section 89 complaint, the complainant is to advise the Board within 16 days of the date hereof, whether it wishes to proceed with the complaint. The Board will terminate the proceedings in File No. 0754-86-U if the complainant fails to advise it within that time limit that it wishes to proceed with the complaint.

2446-86-R; 2447-86-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant, v. Caterpillar of Canada Ltd., Respondent, v. Group of Employees, Objectors; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant, v. Caterpillar of Canada Ltd., Respondent

Bargaining Unit - Certification - Practice and Procedure - Employer alleging that one-third of employees should be excluded from bargaining unit by operation of s.1(3)(b) - Exclusions sought by employer appearing to be at variance with Board jurisprudence - Examination process for large group of employees time consuming and expensive - Employer directed to file statement elaborating on job functions which would warrant a s.1(3)(b) exclusion

BEFORE: *Judith McCormack*, Vice-Chairman, and Board Members *R. J. Gallivan* and *H. Peacock*.

DECISION OF THE BOARD; February 12, 1987

1. These are two applications for certification in which the Board determined that an interim certificate should issue on December 19, 1986. At that time, the Board was advised that the employer had taken the position that 53 employees should be excluded from the bargaining unit, either by operation of section 1(3)(b) of the Act or because they did not share a community of interest with other employees, or both. This represents approximately one-third of the total number of employees for whom certification was sought. Both parties requested the appointment of a Board Officer to inquire into and report on these matters.

2. At that time, the Board expressed its concern to the parties that the exclusions asserted by the respondent were unusually broad in relation to the Board's jurisprudence, and that the normal examination process would be very costly and time-consuming as a result. Rather than appointing a Board Officer at that time to conduct the necessary examinations, the Board arranged for the parties to meet with a Board Officer to attempt to reduce the number of individuals whose exclusion from the bargaining unit was in dispute. (See *Caterpillar of Canada Ltd.*, [1987] OLRB Rep. Jan. 27.) A perusal of the relevant jurisprudence was recommended to the parties.

3. The parties met with two Board Officers on January 16, 1987. At that time, they were able to agree that W. H. Twaddle, D. S. Rihal and R. J. Povilonis were excluded from the bargaining unit on the basis that they are professional engineers. They also requested that:

- a) the Board appoint a Labour Relations Officer to assist them in the preparation of an agreed statement of facts with respect to the community of interest dispute affecting 29 of the employees which, the parties agreed, would form the basis of the Board's decision with respect to that dispute;
- b) the Board appoint a Labour Relations Officer to meet with the parties to inquire into the duties and responsibilities of 22 individuals whose status as employees is in dispute under section 1(3)(b) of the Act, either on the basis that they exercise managerial functions or on the basis that they are employed in a confidential capacity in matters relating to labour relations, or both.

4. It should be noted that those employees challenged on the basis that they do not share a community of interest with other employees have also been challenged on the basis of section 1(3)(b) so that depending on the outcome of the community of interest dispute, further proceedings may be necessary with respect to these individuals.

5. Though we appreciate that the parties were able to agree on some matters, we feel compelled to reiterate that many of the remaining exclusions sought by the respondent appear, at least at first glance, to be at variance with the Board's jurisprudence. We also emphasize again that the examination process for such a large group of employees will be expensive and time-consuming.

6. In our view, this is a case where the filing of certain information and material may assist the parties in further narrowing the issues in dispute and will facilitate the orderly disposition of those matters remaining in dispute. (See *Green Gables Manor Incorporated*, unreported, Board File No. 2030-85-R, January 28, 1986 for a brief review of the utility of this course of action.) Pursuant to section 102(13) of the Act, the Board therefore directs the respondent to file a statement clarifying and elaborating on those duties and job functions which, in the respondent's submission, warrant a finding that the individuals challenged under section 1(3)(b) of the Act are not "employees" within the meaning of the Act. This statement should include a detailed recital of the duties regularly performed by the disputed individuals, highlighting those which are alleged to form the basis of their exclusion from the bargaining unit and citing concrete instances of those latter functions. In addition, the respondent's statement should include all material facts on which it intends to rely in support of its position. The statement should be forwarded to the Board and to the applicant within 14 days of the receipt of this decision. The applicant will then have a further 14 days to file with the Board a written submission, indicating the extent of its agreement or disagreement with the facts said by the respondent to truly represent the employees' duties and such additional facts as the applicant intends to rely upon in support of its position.

7. We further direct the appointment of a Board Officer to assist the parties in the preparation of an agreed statement of facts in the community of interest dispute which will form the basis of the Board's decision in that dispute.

0726-86-U Michael Connolly and Ucal Powell, Complainants, v. United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Toronto and Vicinity, Matt Whelan and United Brotherhood of Carpenters and Joiners of America Local Union No. 27, Respondents

Construction Industry - Duty of Fair Representation - Intimidation and Coercion - Ratification and Strike Vote - Unfair Labour Practice - Manner in which local union meetings conducted not prima facie breach of fair representation duty - Political differences in union local insufficient to indicate intimidation and coercion - Complaint with respect to entitlement to vote in ICI sector strike vote must be made to Minister under s.149a and not to Board under s.72(5) - Complaint dismissed as disclosing no prima facie case with respect to any of the pleaded sections of the Act

BEFORE: Robert J. Herman, Vice-Chairman, and Board Members J. A. Rundle and R. R. Montague.

APPEARANCES: Michael Connolly and Ucal Powell for the complainants; Douglas J. Wray, Frank Rimes and Matt Whelan for Carpenters' Local No. 27, Carpenters District Council of Toronto and Matt Whelan; L. N. Gottheil and Derrick Manson for United Brotherhood of Carpenters' and Joiners of America.

DECISION OF THE BOARD; February 4, 1987

1. The complainants allege that some or all of the named respondents violated sections 3, 68, 70, and 72(5) of the *Labour Relations Act*. In a hearing convened on September 22, 1986, the Board heard submissions from all parties and delivered oral reasons dismissing this complaint. We hereby confirm that decision and set out more fully the reasons given at the hearing.

2. The respondents argued, *inter alia*, that the complaint ought to be dismissed as disclosing no *prima facie* case with respect to any of the pleaded sections of the Act. Dealing first with the allegation pursuant to section 68 of the Act, the Board dismissed the complaint for the following reasons. The complainants, as set out in the written complaint filed in this proceeding and as expanded by both complainants at the hearing, have alleged that the respondents breached section 68 in their treatment of the complainants with respect to the manner in which local union meetings were conducted. As the complainants stated in the complaint filed:

1. Michael Connolly is a member of the United Brotherhood of Carpenters and Joiners of America (the "international union") and has been for approximately nine years. He is also a member of Local 27 of the international union and has been a committee member and active in trade union affairs.
2. Ucal Powell is a member of the international union and has been for approximately sixteen years. He is also a member of Local 27 of the international union. He had held elected union office in prior years and has always been active in trade union affairs.
3. Matt Whelan is President of Local 27 and President of Carpenters District Council of Toronto and vicinity (the "District Council"). By virtue of his position as President of Local 27, Mr. Whelan acts as chairman of local union meetings.
4. Important differences of principle with respect to collective bargaining matters arose between the complainants and others and Mr. Whelan and others. In addition, the complainants objected continually to the undemocratic and unconstitutional manner in which Mr. Whelan conducted local union meetings.
5. On August 13, 1985, Mr. Powell challenged the chair occupied by Mr. Whelan at a Local 27 meeting in a manner consistent with the constitution of the international union.
6. On September 5, 1985, Mr. Whelan laid a charge against Mr. Powell arising from the incident which occurred on August 15 [*sic*], 1985.
7. On September 3, 1985, Mr. Connolly insisted that a Local 27 meeting be conducted in accordance with the international union constitution. An objection was raised about the failure of the Recording Secretary of Local 27, William Armstrong, to accurately record in the minutes the events described in paragraph 5 above, and, in particular, his failure to include the fact that Mr. Powell had challenged the chair. After another member had challenged the chair occupied by Mr. Whelan, Mr. Connolly rose on point of order and insisted that the meeting be conducted in a manner consistent with the international union.
8. On September 5, 1985, Mr. Whelan laid a charge against Mr. Connolly, arising from the incident which occurred on September 3, 1985.
9. The charges against Messrs. Connolly and Powell were preferred, as required under the international constitution, at the District Council. The District Council executive has the power to either dismiss charges or to refer same to a trial committee of the District Council.

10. Two members of the executive of the District Council in the case of Mr. Connolly were present at the time of the events giving rise to the charge and were known to be opponents of Mr. Connolly concerning collective bargaining and others matters. The complainant Connolly understands that, in addition, Mr. Whelan, who was also similarly opposed to Mr. Connolly, was in attendance at that District Council executive meeting. The executive decided to refer the charge to a trial committee.
11. The executive of the District Council decided also to refer the charge against Mr. Powell to a trial committee.
12. In the case of Mr. Powell, the Recording Secretary of Local 27, William Armstrong, who was present on the occasion of the events giving rise to the charges against Mr. Powell, was a member of the trial committee constituted to hear the charge. Mr. Armstrong was known to be an opponent of Messrs. Powell and Connolly concerning collective bargaining and other matters.
13. After a "trial" conducted under the auspices of the District Council, Messrs. Connolly and Powell were found guilty in October 1985. On November 14, 1985, Messrs. Connolly and Powell were barred from attending meetings or holding office for two years.
14. An appeal by Messrs. Connolly and Powell to the Standing Appeals Committee of the international union was rejected by letter dated April 15, 1986.

3. To summarize the above particulars, the complainants essentially seek to question, by alleging a breach of section 68, the procedures followed by the respondents in the conducting of local union meetings, in the alleged failure to follow the constitution of the International Union, and in the processing and trial of charges against the two complainants, as referred to under that same constitution. There was no suggestion that any of these complaints were concerned with the representation by any of the respondents of the complainants with respect to any employment matters or any relationship with their employers.

4. As the Board stated in *Frank Manoni*, [1981] OLRB Rep. Dec. 1775:

10. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The first problem facing the complainants in this regard is that neither of them are *employees in a bargaining unit*. This is more than a technicality. The section is an outgrowth of what certain American cases, such as *Vaca v. Sipes* (1967), 386 U.S. 171, described as "the duty of fair representation", and is concerned with the representation of employees *with their employer*.

11. This precise point was dealt with by the Board in *Arthur Joseph Roberts v. Operative Plasters' and Cement Masons' International Association of the United States and Canada, Local 48*, [1974] OLRB Rep. Mar. 169, in which the complainant, an elected business agent of the Local, complained that he was arbitrarily removed from office. The Board stated, at paragraph 8:

...the duty of fair representation owed by a trade union to an employee under section 60 (now section 68) of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour vis-a-vis its members is governed by its constitution and by-laws and the procedural remedies provided there-

in. And recourse must be made by an aggrieved member of the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v. Kuzych* (1951), A.C. 585; *Lee V. Showmans Guild* (1952), All. E.R. 1175; *Orchard v. Tunney*, (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v. Cunningham (No. 1)* (1959), 20 D.L.R. (2d) 377; *Jurak et al v. Cunningham (No. 2)* (1959), 20 D.L.R. (2d) 381; *Gee v. Freeman et al* (1958), 26 W.W.R. 546).

The Board went on to hold, at paragraph 20, that "under section 60 a trade union's duty of fair representation does not extend to members in good standing who are not employees in a bargaining unit". To a similar effect, see *Gale Douglas Devereaux*, [1975] OLRB Rep. Nov. 885, at paragraph 9. It should be added that even if brought by persons currently employed in a bargaining unit (and the complainants claim to "represent" a number of such persons), the present complaint still would be misconceived under section 68. The arbitrary, discriminatory or bad faith conduct directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees *at the hands of their employer*.

5. We agree with and adopt the proposition set out in the quoted passages above. Section 68 is concerned with the duty owed by unions to employees whom they represent, in a given bargaining unit, with respect to the representation of those employees insofar as their relationship with their employer is concerned. It is common ground in the instant proceeding that the facts complained of do not involve representational rights with respect to any employer. Accordingly on this ground the complaint is dismissed.

6. The complainants further alleged a violation of section 72(5) of the Act, which reads as follows:

(5) All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

The particulars set out in the complaint with respect to the alleged breach of this subsection read as follows:

15. Collective bargaining took place during 1986 between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (the "Provincial Council").
16. On May 25, 1986, a meeting for purposes including the taking of a strike vote was held by Local 27. Messrs. Connolly and Powell attended that meeting with the intention of exercising their right to vote. Mr. Whelan was in the chair. During the meeting and at a time when the vote was taking place, Mr. Whelan insisted that Messrs. Connolly and Powell leave the meeting. As a result Messrs. Connolly and Powell were denied the right to vote and afforded no opportunity to do so.

7. All parties agreed that the strike vote in question was with respect to the ICI sector of the construction industry, and the collective bargaining issue was with respect to the provincial agreement. Based on the circumstances as particularized and agreed to by the parties at the hearing, the Board is of the view that section 149a of the *Labour Relations Act* is applicable, and would have the effect, where there is a conflict, of overriding any rights provided under section 72(5) of the Act.

8. Section 149a of the Act reads as follows:

149a.-(1) Where an employee bargaining agency or an affiliated bargaining agent conducts a

strike vote relating to a provincial bargaining unit or a vote to ratify a proposed provincial agreement, the only persons entitled to cast ballots in the vote shall be,

- (a) employees in the provincial bargaining unit on the date the vote is conducted; and
- (b) persons who are members of the affiliated bargaining agent or employees bargaining agency and who are not employed in any employment,
 - (i) on the day the vote is conducted, if the vote is conducted at a time when there is no strike or lock-out relating to the provincial bargaining unit, or
 - (ii) on the day before the commencement of the strike or lock-out, if the vote is conducted during a strike or lock-out relating to the provincial bargaining unit.

(2) Where an employer bargaining agency or employers' organization conducts a lock-out vote relating to a provincial bargaining unit or a vote to ratify a proposed provincial agreement, the only employers entitled to cast ballots in the vote shall be employers represented by the employer bargaining agency or employers' organization that employed,

- (a) on the day the vote is conducted, if the vote is conducted at a time when there is no strike or lock-out relating to the provincial bargaining unit; or
- (b) on the day before the commencement of the strike or lock-out, if the vote is conducted during a strike or lock-out relating to the provincial bargaining unit,

employees who are represented by the employee bargaining agency or an affiliated bargaining agent that would be affected by the lock-out or would be bound by the provincial agreement.

(3) Within five days after a vote is completed, the employee bargaining agency, affiliated bargaining agent, employers' organization or employer bargaining agency conducting the vote, as the case may be, shall file with the Minister a declaration in the prescribed form certifying the result of the vote and that it took reasonable steps to secure compliance with subsection (1) or (2), as the case may be.

(4) Where a complaint is made to the Minister that subsection (1) or (2) has been contravened and that the result of a vote has been affected materially thereby, the Minister may, in the Minister's discretion, refer the matter to the Board.

(5) No complaint alleging a contravention of this section shall be made except as may be referred to the Board under subsection (4).

(6) No complaint shall be considered by the Minister unless it is received within ten days after the vote is completed.

(7) Where, upon a matter being referred to the Board, the Board is satisfied that subsection (1) or (2) has been contravened and that such contravention has affected materially the results of a vote, the Board may so declare and it may direct what action, if any, a person, employer, employers' organization, affiliated bargaining agent, employee bargaining agency or employer bargaining agency shall do or refrain from doing with respect to the vote and the provincial agreement or any related matter and such declaration or direction shall have effect from and after the day the declaration or direction is made.

9. Of particular note in the instant proceedings are subsections 4 and 5 of section 149a. Those subsections make clear that any complaint with respect to entitlement of persons to cast ballots in a strike vote or ratification vote in the ICI sector must be made to the Minister, and not to the Ontario Labour Relations Board. Subsection 6 of section 149a requires that any such complaint

with respect to a vote held pursuant to s.149a, made to the Minister, must be made within 10 days after the vote is completed. In the instant proceedings, the complaint deals with the entitlement of the complainants to vote in an ICI strike vote, a vote dealt with under s.149a, but the complaint before the Board was neither made to the Minister, nor made within ten days of the vote being held, as required by s.149a(4), (5) and (6). The Board's general authority under s.89 of the Act, to deal with contraventions of the Act, must be read as modified by s.149a(5). Section 149a came into effect on June 27, 1984, and was designed to regulate the entitlement of employees to vote in the ICI sector, and further to regulate the procedures for complaining about the entitlement of individuals to cast ballots in any such votes. When an individual seeks to complain about such a matter, it is incumbent upon that individual to follow the procedures prescribed in section 149a.

10. Section 138 of the Act states, in effect, that the provisions of section 149a shall prevail in the event of any conflict between it and section 72. The subsection alleged to have been breached, 72(5), deals with entitlement to vote, the very subject matter dealt with by s.149a, with respect to ICI votes. In the circumstances of this case, we conclude that the combined effect of sections 138 and 149a are such that section 149a supplants section 72(5), and the complainants had to complain pursuant to section 149a, to the Minister, and within ten days of the strike vote having been taken. For the Board to have the jurisdiction to consider the allegations set out by the complainants, the Minister, if he so chose, would have had to refer this question to the Board. Accordingly, the complaint insofar as it alleges a violation of section 72(5) of the Act is hereby dismissed.

11. The complaints also allege a violation of section 70 of the Act. Section 70 reads as follows:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

12. To find a *prima facie* case for purposes of section 70, the pleadings, either as particularized in the complaint or as expanded upon by the complainants, must allege instances of intimidation or coercion. The complainants in their oral submissions to the Board made clear that neither physical intimidation nor threats were involved. Rather, the complainants alleged that political differences with the leadership of Local 27 and the International Union caused them to be removed from the Local. Members "have been shown that if they express views contrary to the respondent Whelan they can expect to be thrown out of union meetings or perhaps worse." They further alleged intimidation or coercion resulting from unfair constitutional provisions of the union, or from those same constitutional provisions not being followed by the respondents. In the complainants' view any dissenting voices within the union, including their own, were being unfairly stifled by any or all of the respondents. Finally, they alleged economic intimidation on the ground that a right to employment was being denied. There were no specifics, other than as set out in the particulars and as recited in this paragraph, suggesting particular intimidating or coercive actions.

13. The Board's task in assessing whether a *prima facie* case exist is a delicate one. We take as true all the facts alleged by the complainants, but having done so, the Board must assess whether the facts, if proved, would sustain an arguable violation of the *Labour Relations Act*, as against insuring that respondents must know, prior to being subjected to a hearing, what the complaint is against them and that if proven true, such complaint is at least arguably a violation of the Act. Respondents must know the case alleged against them in sufficient detail to be able to prepare a defence. In the instant case, there is nothing in the particulars, as written and as expanded before the Board, setting out particular instances of either intimidation or coercion such that an arguable case under section 70 could be found. Whether the internal union procedures are fair or

not, or are perhaps designed to penalize certain employees, are matters generally of an internal union nature, and do not attract Board scrutiny pursuant to section 70. Our scrutiny pursuant to that section is limited by its very words to instances suggestive of intimidation or coercion, none of which have been pleaded (see, for example, *Keith Sutherland*, [1983] OLRB Rep. July 1219). Accordingly the complaint insofar as it alleges a breach of section 70 is also dismissed.

14. The complainants also pleaded a violation of section 3 of the Act. The Board has held in numerous cases (e.g. *Keith Sutherland*, *supra*) that section 3 of the Act does not create a substantive offence. In the instant proceeding whether standing alone or taken in concert with section 68, 70, or 72(5), the Board is satisfied that there is no *prima facie* case for a violation of section 3, and accordingly the last aspect of the complaint is also dismissed.

15. In giving its oral decision as set out above, the Board noted that the decision dismissing the complaint was without prejudice to the complainants' right to refile a complaint pursuant to section 70 of the Act, provided they can plead sufficient and necessary facts, suggesting particular instances of intimidation or coercion and linking those instances to an alleged breach of section 70 of the Act. At this stage, as pleaded and expanded, those particulars are not sufficient on which to base a *prima facie* case, but the Board made clear to the complainants that they were free to refile provided proper particulars were provided.

16. The Board notes the undertaking given at the hearing by counsel for Local 27, the District Council, and Matt Whelan, that should there be any proposed amendment to the current provincial agreement that is referred to the membership for ratification, during any term of suspension arising from the pleaded facts, still applicable to the complainants, the complainants will be allowed to and entitled to vote on any such proposed amendment. Counsel was not undertaking that any such amendment would in fact be referred to the membership for ratification; rather, if the union did decide to so refer it the complainants would both be fully entitled to participate in any such vote.

17. Based on the above, this complaint is dismissed.

0469-86-U Maria Fatima Costa, Complainant, v. Labourers' International Union of North America, Local 183, Respondent, v. Burlington Canada Inc., Intervener

Duty of Fair Representation - Unfair Labour Practice - Employer requesting that grievance proceed to arbitration but union refusing - Complainant alleging that union vice-president influenced by hostility towards employer - Board finding that union acting to correct mistaken interpretation of collective agreement by employer - Union acting in best interests of employees in bargaining unit - Complaint dismissed

BEFORE: *Patricia Hughes*, Vice-Chairman.

APPEARANCES: *R. C. Schipper* and *Maria F. Costa* for the complainant; *L. A. Richmond*, *D. Wintermute* and *M. O'Brien* for the respondent; *Joe Carrier* and *Dr. Michael Blacha* for the intervener.

DECISION OF THE BOARD; February 17, 1987

1. "Burlington Canada Inc." is hereby added to the style of cause as intervener.

2. This complaint was based both on section 68 and section 69 of the *Labour Relations Act* ("the Act"). Counsel for the complainant agreed at the outset of the hearing that section 69 does not apply to the facts of this case. The complaint is accordingly dismissed in so far as it refers to section 69 since it does not establish a *prima facie* case under that section.

3. Maria Fatima Costa is a roll-up machine operator at Burlington Canada Inc. ("the employer" or "the company" or "Burlington Carpets") where she has worked since March 2, 1972. In January 1986, she bid for a job as an inspection floor machine operator and was successful. However, she had held the position for only one day when she was informed that a mistake had been made and Clementine Henry should have been given the job instead of her. She was told that since Ms. Henry was already in the inspection floor machine operator classification, the position was incorrectly posted; there had not actually been a vacancy since someone (Ms. Henry) was already doing the work. She returned to her previous job and asked Labourers' International Union of North America, Local 183 ("the union" or "Local 183") to file a grievance for her. When the union decided not to proceed to arbitration with her grievance after it had been dismissed by the employer at the third stage, Ms. Costa filed this complaint under section 68 of the Act alleging that her union had failed to represent her in an appropriate manner.

4. Section 68 states that

[a] trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

5. Ms. Costa alleges that the union breached all three heads of section 68 and acted in bad faith and in a discriminatory and arbitrary manner towards her. She asserts that the union was motivated by an extraneous reason in deciding not to proceed to arbitration in that Local 183's vice-president and business representative, Michael O'Brien was influenced by hostility towards the employer, and specifically towards its personnel director, Michael Blacha, rather than by the merits of her grievance and therefore acted in bad faith. She further asserts that in being prepared to take other similar grievances to arbitration but not hers, the union was discriminatory. She also claims that the union failed to address the merits of the grievance adequately, but that Mr. O'Brien and the chief steward, Dick Holmes, had predetermined the grievance before the third stage meeting, thereby acting arbitrarily.

6. The "bad faith" head of section 68 refers to bad faith *in relation to the complainant* and not to some third party. Counsel for Ms. Costa conceded that there was no allegation that the union had acted out of hostile motive or bad faith towards Ms. Costa herself. However, a union may be motivated by a factor so extraneous to the circumstances of the grievance that the Board can infer that it was acting out of ill will towards the complainant: *Leonard Murphy*, [1977] OLRB Rep. Mar. 146. In that case, the Board found that the union had acted in an arbitrary manner and then went on to say, at paragraph 30:

30. While the above finding of arbitrary conduct by itself constitutes a violation of section [68] the Board is moved by the facts of this case to find as well that the Union Committee acted in bad faith. A concern for the rights of the grievors was fully eclipsed by what the Board has concluded to be the desire to protect the position of the relatives of Mr. Clarke [President of the respondent union] and the assistant foreman. When arbitrary conduct is motivated by a factor so extraneous and so counter to legitimate bargaining concerns it may reasonably be characterized as sinister. The full extent to which the grievors' rights were ignored indicates to this Board that they were the subject of the Union Committee's hostility.

In the instant case, Dr. Blacha, after having denied the grievance at third stage, wrote to the union on February 12, 1986, requesting that the grievance proceed to arbitration. He explained he wrote the letter because he had had one or two conversations with Ms. Costa in which she asked him to help her; he found that unsettling and disruptive. In addition, he thought it would be a good idea to get a ruling on the issue of whether the classification practice which had resulted in Ms. Costa's removal from her new position applied to small departments. Mr. O'Brien replied by letter on February 20, 1986, indicating that the union was not referring the grievance to arbitration. He then went on to allege that the attempt of the company to refer Ms. Costa's grievance to arbitration was "a clear case of interference with the administration of a trade union, and blatantly [sic] violates the Labour Relations Act. We view your actions, moreover, as an improper attempt to interfere with the representation of the employees in the bargaining unit by the union, carried out with the purpose of causing dissension among the employees in the bargaining unit, and as encouraging hostility towards the trade union by a group of employees". Dr. Blacha then informed Mr. O'Brien in a letter dated February 26, 1986, that until Mr. O'Brien's February 20th letter, "we had no formal notification that this grievance would not be pursued [sic]" and that having now received such notification, the company did not wish to proceed to arbitration. Dr. Blacha showed the letter to Ms. Costa, told her there was nothing else he could do, and in response to her request, gave her the name of the Law Society of Upper Canada's lawyer referral service. This exchange reflected the different views of Mr. O'Brien and Dr. Blacha with respect to the interpretation of article 8.04 of the collective agreement between the company and the union. Article 8.04 states that where there is no final settlement of a grievance at the third stage and the grievance "concerns the interpretation or alleged violation of the Agreement", either party may refer the grievance to arbitration. Mr. O'Brien was of the view, on legal advice, that this meant that the union referred *its* grievance to arbitration and the company referred *its* grievance to arbitration, but the company did not refer those brought by the union and the union did not refer those brought by the company. Dr. Blacha thought that the origin of the grievance was irrelevant, but that either party could proceed to arbitration with a grievance brought by either party. Which interpretation is correct is not for the Board to decide. However, it is clear that this exchange concerned matters beyond Ms. Costa's specific grievance. Counsel for Ms. Costa argued that Mr. O'Brien's letter was evidence that the union was more concerned with its dispute with the company than with Ms. Costa's grievance and that the only reason it refused to accede to the request to proceed to arbitration was because the company wanted to proceed. Thus, counsel contended, the union was motivated by an extraneous factor amounting to bad faith. He pointed out that Mr. O'Brien nowhere in the February 20th letter to Dr. Blacha raised the practice followed by the company and union which the union claimed had led to the removal of Ms. Costa from the job and the giving of the job to Ms. Henry; that was further evidence that Mr. O'Brien was not addressing his mind to the merits of the grievance, but merely playing out the hostility he felt towards Dr. Blacha. I do not so find. The union had already decided not to proceed to arbitration with Ms. Costa's grievance before this exchange of letters and the reasons for reaching that decision had been communicated to Dr. Blacha and to Ms. Costa. Furthermore, Mr. O'Brien's letter was directed at what I find to be a genuine belief (upon the validity of which I do not comment) that the company was interfering with the administration of the union. Mr. O'Brien believed, rightly or wrongly, that Dr. Blacha was taking advantage of comments by Ms. Costa at the third stage meeting to the effect that she would get rid of the union. Under these circumstances, it is not surprising that Mr. O'Brien would not attempt to justify the union's decision not to proceed to arbitration; the letter was itself intended to convey to the company that the decision to proceed or not to proceed to arbitration was solely within the union's discretion, a decision for which the union was not accountable to the company or which the company could not change. I find that the letter of February 20 does not represent a factor so extraneous that it leads to an inference that Mr. O'Brien was acting out of ill will towards Ms. Costa in refusing to proceed with her grievance; it may well evidence hostility towards Dr. Blacha, in his capacity as the company's personnel director, but I find that that dispute was not a reason underlying the

union's refusal to proceed to arbitration. Accordingly, I find that the allegation that the union acted in bad faith in refusing to proceed to arbitration with Ms. Costa's grievance to be unsubstantiated.

7. Ms. Costa did not argue that the union had acted in a discriminatory way because of some particular characteristic defining her or because she belongs to a particular category of person. She simply says that the union has taken one grievance similar to her own to arbitration involving an employee named Stephen Clark ("the Clark grievance") and indicated that it would take Ms. Henry's grievance had Ms. Costa been given the job instead of Ms. Henry ("the Henry grievance"). The facts of the Clark grievance are sufficiently different from that of Ms. Costa's case that I find the fact the union's proceeding with the Clark grievance does not constitute evidence that the union has acted in a discriminatory manner. Clark and the other employee involved were in different departments. The vacancy arose in Clark's department but the position was given to the other employee who had one week's seniority over Clark. Ms. Costa and Ms. Henry work in the same department. The Henry grievance is the opposite side of Ms. Costa's grievance. The union contends that it had reason not to proceed with Ms. Costa's grievance; the same reason would explain proceeding with the Henry grievance. Ms. Costa adduced no evidence to support the contention that the Henry grievance would have proceeded to arbitration (had it arisen at all) because it would have been filed by Ms. Henry while her own grievance did not proceed because it had been filed by herself (in that respect, however, she did testify that she had told Mr. Holmes that he worked only for his "own people", meaning black people, but that was not put forward as an allegation of fact; I consider this matter further below). *If* the union had reason not to proceed with Ms. Costa's grievance, it would have been reasonable for it to proceed with a grievance filed by Ms. Henry relating to the same matter. I find that the stated willingness of the union to proceed with the Henry grievance (which is in any case merely intention since no grievance was filed by Ms. Henry) does not constitute discrimination against Ms. Costa.

8. The crux of Ms. Costa's case lies in the prohibition against arbitrary conduct by the union in its representation of the employees in the bargaining unit. Indeed, in my view, all her allegations, including those couched in the language of bad faith and discrimination are more accurately allegations directed at the arbitrary head of section 68 and I deal with them from that perspective.

9. Ms. Costa was given the inspection floor machine operator job, instead of Ms. Henry, apparently the only other applicant (although she believed she was entitled to the job and that there was no vacancy, Ms. Henry put in an application for the position because she was being "cautious") because she had more seniority than Ms. Henry. She was not at the time employed in the classification of inspection floor machine operator. Roll-up machine operator and inspection floor machine operator are both in the inspection floor department, however. Ms. Henry, on the other hand, had been performing the work of the inspection floor machine operator, first on the second, less preferable, shift and then, when Ms. Celia Parvao, who performed the job on the first shift, became ill, on both first and second shifts. Eventually, the second shift was eliminated and Ms. Henry continued to do the work on the first shift. No notice of vacancy had been posted with respect to the replacement of Ms. Parvao while she was away ill. In late December 1985 or early January 1986, Ms. Parvao informed Burlington Carpets that she would not be returning to work. A notice of job vacancy was posted on January 6, 1986, according to Dr. Blacha, or on January 2, 1986, according to the notice, for inspection floor machine operator (now performed on only one shift, the second shift having been laid off). Ms. Costa was given the position on the instruction of Dr. Blacha. Mr. Holmes then went to see Dr. Blacha and reminded him that where someone is already doing a job in the same classification, there is no vacancy; therefore, the job is not posted and it is given to the person in the classification. Ms. Henry was the only person in the classifica-

tion and therefore, argued Mr. Holmes, she should have been given the job permanently. (Ms. Henry had gone to see Mr. Holmes when the job was posted and asked why it had been posted when she was the only person in the classification; Mr. Holmes had told her to wait to see what the company would do. When Ms. Costa got the job, Ms. Henry asked Mr. Holmes to put in a grievance for her, but that was not done because Ms. Henry was subsequently given the job.) Dr. Blacha agreed that that had been the practice as applied by the employer and the union, although he had some concerns about the reasonableness of its actual application to small departments, such as the one in which the inspection floor machine operator position was included. He therefore instructed the department manager, Carlos Pettrucchi, to tell Ms. Costa that he had made a mistake and that he was sorry, but she could not have the job. Ms. Henry was given the position. (Since the events giving rise to this complaint, the company and the union have established the following practice: if a vacancy arises on the first shift, the most senior person in the job classification on the second shift is asked if he or she wants the position and, in turn, the most senior person in the classification on the third shift is asked if he or she wants the second shift; the classification on the third shift is posted; if there is no second or third shift, a posting is put up and any employee in the plant, on seniority and qualifications, is eligible for the position: this effectively means that article 15.01 of the collective agreement (set out below) applies where there is one shift. Dr. Blacha testified that the company would have turned to Ms. Henry on the January 1986 facts under the new procedure and admitted that the new system does not address the question of whether to apply the classification in small departments.)

10. Ms. Costa felt that she was entitled to the job and she raised the matter with the union. She talked to Mr. Holmes but she believed he would not represent her adequately, although he said he would file a grievance for her. She did not feel comfortable going to Mr. Holmes, she did not trust him and she told him "to his face" that he represented only "his own people" (Mr. Holmes and Ms. Henry are black; Ms. Costa is white). Mr. Holmes said that he did not believe her grievance had any merit, but he thought "she has the right to understand our side and find out the facts and that [filing a grievance] is the only route we have"; therefore, he was prepared to file a grievance for her. On the suggestion of Mr. O'Brien, to whom Mr. Holmes brought the matter over the telephone, Mr. Holmes suggested that Joe Schindler file a grievance for her because he is white. However, Ms. Costa said she did not need him because Mr. Grewal, her own steward, was taking her grievance; I find also on the evidence that she did not want Mr. Schindler filing a grievance for her because she associated him with Mr. Holmes.

11. There was some discrepancy between Mr. O'Brien and Ms. Costa with respect to their first contact with each other. Ms. Costa says that she first raised the matter with Mr. O'Brien at a normal union meeting one week after she had been taken off the job but before she filed her grievance on January 22, 1987; Mr. O'Brien says that she telephoned him after speaking to Mr. Holmes and that she was upset. Ms. Costa agreed she subsequently telephoned him to find out if the union were proceeding to arbitration because "no one would tell me nothing". I prefer Mr. O'Brien's testimony in this matter. Mr. O'Brien said that Ms. Costa said that the union was taking her job away; he said she must be mistaken because the union does not take away jobs; he said that he did not know what she was talking about but that she should put in a grievance and talk to Mr. Holmes. She replied she would not speak to Mr. Holmes, that he had created the problem. Mr. Holmes testified that Mr. O'Brien told him that Ms. Costa had said that Mr. Holmes refused to put in a grievance for her. I find that whether Ms. Costa told Mr. O'Brien that or not, Mr. Holmes did not refuse to file a grievance but that Ms. Costa did not want him to file a grievance for her. Mr. O'Brien normally does not become involved in the grievance process until the third stage and then only if Mr. Holmes calls him. Mr. Holmes testified that Mr. O'Brien wanted a grievance meeting in order to get the whole story in this instance. At a union meeting on January 26, 1986, Ms. Costa raised her concerns and there was some brief discussion. After the meeting there was further dis-

cussion between Ms. Costa and Mr. O'Brien; Mr. O'Brien said that he did not think there was a vacancy but that they would examine the situation at the third stage grievance meeting.

12. Ms. Costa's shop steward, Mr. Grewal, completed a grievance form for Ms. Costa who then signed it. A third step meeting was held on January 28, 1986 at 11:00 a.m. attended by Ms. Costa, Mr. O'Brien, Mr. Holmes, Mr. Grewal and Dr. Blacha and Dr. Blacha's secretary, Monica Rentz. Dr. Blacha explained the situation to Ms. Costa who became extremely agitated, expressing concerns about being laid off and not being trained for any other job, and had to be taken from the room by Dr. Blacha. She did not return to the meeting and Dr. Blacha later sent her home. The meeting then continued with some general discussion of the reasonableness of applying the practice to small departments. The union favoured applying it; Dr. Blacha had some reservations about doing so. At the end of the meeting, the union was of the view that Dr. Blacha would deny the grievance because he said that, while he had some concerns about applying the practice in small departments, for the sake of consistency in the practice, he would deny the grievance and on February 3, 1986 he did deny the grievance in writing. Ms. Costa says that no one specifically told her the result of the meeting or answered her questions. She had to ask Mr. Grewal. However, she agreed on cross-examination that Mr. Holmes explained she had been removed from the job because she was not in the classification. Mr. Grewal also explained the union's position to her, although he disagreed with it. She also admitted that the only reason she did not have an opportunity to ask questions at the third step meeting was because she "got mad at the union", started crying and was taken from the room.

13. Mr. O'Brien and Mr. Holmes did not believe the grievance should be taken to arbitration. They believed the practice had been properly followed. If Ms. Costa won her grievance and was given the job, Ms. Henry would then grieve. Taking the grievance to arbitration would, in their view, undermine a system which they believed had worked to the advantage of all of the employees because it restrained competition for jobs; without it, they testified, anyone with high seniority could displace employees with less seniority. Mr. Grewal thought the grievance should be arbitrated. At the request of Mr. O'Brien, Mr. Holmes called a meeting of shop stewards. Such meetings are not held in every instance in which arbitration is a possible course of action, but where certain kinds of issues are at stake. Where there is a dispute between two employees, as here, a meeting will be called. Six stewards plus Mr. Holmes were present at the meeting at which Mr. Holmes outlined the issues; Mr. Grewal was not present. One steward believed that the grievance should be arbitrated and the others said it should not be.

14. Article 15 of the collective agreement sets out the procedure to be followed where there is a permanent vacancy:

15.01 All permanent vacancies in new job classifications and in existing job classifications shall be posted in the plant for a period of three (3) working days and any employee in the plant may make application for such vacancy. In the filling of vacancies the Company will first consider applicants from within the department in which the vacancy has occurred. Where no qualified applicant from the department has applied the Company will then consider applicants from outside the department who have made application within the above-noted three (3) working days. Where no qualified employee has applied, the Company shall not be limited to selecting employees who have made application and may hire persons from outside the plant.

Article 14, dealing with "promotions and transfers" is also relevant:

14.01 In cases of promotions and transfers to permanent vacancies within the plant, the following factors shall be considered:

- (a) seniority and

- (b) qualifications.

Seniority shall govern if in the judgement of the Company qualifications are relatively equal.

Article 13 sets out the procedure relating to lay-offs and recall, which apply to lay-offs anticipated to three working days within any job classification. The operative portions of article 13 are as follows:

13.01 ...

- (a) [probationary employees to be laid off first with no right of recall]

- (b) Thereafter these factors shall be considered:

- (i) seniority, and
- (ii) qualifications.

Plant-wide seniority of the employees within the job classifications in the department shall govern, if, in the bona fide judgement of the Company, qualifications are relatively equal.

...

- (c) Where, in the bona fide judgement of the Company, qualifications are relatively equal, senior employees displaced by (b) above may exercise their plant-wide seniority and displace an employee with less seniority;

- (i) who holds the same job classification in another department;
- (ii) who holds a different job classification in his own department.

...

13.03 Employees who are laid off shall be recalled by job classification to the department from which they were laid off with the same preference as to recall as they were entitled on layoff.

...

15. The union's position is that there is not a permanent vacancy because Ms. Henry was already doing the job. Therefore, article 15.01 does not apply and there should not have been a posting at all. Although Dr. Blacha and the company disagree with that position, Dr. Blacha testified that the outcome would have been the same regardless of whether there had been a posting and Ms. Henry would have obtained the job. Furthermore, if Ms. Henry had been laid off from the floor inspection machine operator job when the second shift had been cancelled, she would have been entitled to recall first when Ms. Parvao quit.

16. Counsel argued the merits of the grievance. It is not my task to determine the merits of the grievance, except to the extent the merits constitute a factor going to the reasonableness of the union's position (in this regard, counsel for the union submitted several arbitration cases dealing with the issue of when vacancy provisions in a collective agreement apply and do not apply: *Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500* (1975), 8 L.A.C. (2d) 34 (Brandt); *Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500* (1975), 9 L.A.C. (2d) 83 (Simmons); *Re Corporation of the City of Victoria and Canadian Union of Public Employees, Local 50* (1982), 2 L.A.C. (2d) 368). While I stress that I make no finding about the appropriateness of the policy (except that it in itself does not appear to contravene section 68) or the correctness of its application here (except that it is not so unreasonable as to impugn the union's motive in applying it), I find that the union and the company did apply a policy that where

one person filled a classification and work became available in that classification, the opening was not treated as a permanent vacancy subject to article 15.01 of the collective agreement and therefore was not posted; the individual already performing work in the classification would be given the position. That policy was applied here when Ms. Henry was given the job. She had worked the second shift in the inspection floor machine operator position and was temporarily filling in for Ms. Parvao during the latter's absence. When Ms. Parvao informed the company she would not be returning, the company could have taken one of two routes to filling Ms. Parvao's position. They could have emphasised the temporary nature of Ms. Henry's position and since there was no second shift to which she could return, laid her off, thereby activating the lay-off and recall provisions of the collective agreement. Ms. Henry would then be recalled since she was in the same classification. Or they could have taken the position that there was already someone doing the work in the classification and given her the position permanently, as they did. The union characterized this situation as a shift vacancy. Ms. Henry was working on the second shift (no longer operative) and was only on the first shift because Ms. Parvao had been away. If Ms. Parvao had been at work when the second shift had been eliminated, Ms. Henry would have been laid off or had the opportunity to bump another employee. If a second shift still existed and Ms. Parvao returned, Ms. Henry would have returned to the second shift and if Ms. Parvao left, Ms. Henry would have had the opportunity to move into the first shift since she was the only person in the classification. I make no comment on whether the policy is a desirable one or whether the company and the union have appropriately modified or complemented the collective agreement.

17. An employee does not have an absolute right to have a grievance filed: *Dixie Canada Inc.*, [1984] OLRB Rep. Sept. 1179; *Massey-Ferguson*, [1977] OLRB Rep. April 216; and in reaching a decision under section 68 of the Act, the Board acknowledges that the union is in the best position to weigh competing claims on its recourses: *North York General Hospital*, [1984] OLRB Rep. Feb. 286. However, the union is required to address its mind to the merits of the grievance and to other relevant factors and is proscribed from reaching its decision whether to proceed with a grievance on irrelevant factors. In *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001, the Board said that

19. It is clear that in order to establish a breach of section [68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non-caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

Counsel for Ms. Costa does not dispute that the test set out above is an adequate reflection of the Board's jurisprudence in this area (see *Walter Prinesdomu*, [1975] OLRB Rep. May 444; *North York General Hospital*, *supra*). Rather he argues that the union did act in a perfunctory way, totally ignoring or refusing to consider the complaint. Both Mr. Holmes and Mr. O'Brien, he maintains, had pre-decided the issue before the stage three meeting, while at that meeting most of the time was spent in the "power play" between Mr. O'Brien and Dr. Blacha with respect to the posting issue, rather than on the merits of the grievance. Furthermore, he contends, there was no evidence that they had directed their minds to the grievance or to the collective agreement, which, if followed, in his view would have given Ms. Costa the position. There is no doubt in my mind that Mr. Holmes thought that Ms. Henry should have been given the position; there is also no doubt in my mind that his action in going to Dr. Blacha was instrumental in Ms. Costa's being removed from the position and reinstated in her position as roll-up operator. In that sense, there is also no doubt that he, and later Mr. O'Brien, thought that Ms. Costa's grievance did not have

merit because it was in contradiction to the practice followed where work was available in a classification and an employee was already in that classification. Put simply, there was a practice; Dr. Blacha, for the company, acted against the practice (having forgotten Ms. Henry was in the classification); the union reminded him of the practice; the company remedied the mistake. Because the company had originally made a mistake, it was inevitable that an employee, in this case, Ms. Costa, would feel somehow cheated; but had it not remedied the mistake, another employee, Ms. Henry, would have felt cheated. The union had to weigh the claims of those two employees and in doing so had to consider the ramifications of supporting one rather than the other for the interests of the employees in the bargaining unit as a whole. It did not take Mr. Holmes long to decide whom to support because he knew what the practice was and he knew it had not been followed. Even so, the union was prepared to go to the third stage in order to give Ms. Costa a chance to express her concerns and also to provide a forum for a full explanation. That neither of those goals were fully satisfied results from Ms. Costa's conduct which was not only a reflection of her understandable concern that she might be laid off and be without work, but which was also a reflection of certain of her own attitudes. Her comments were offensive to the other participants because of the allegations made against Mr. Holmes. I find, however, that while her name-calling and other comments upset Mr. O'Brien and, I believe, offended Mr. Holmes (and Dr. Blacha), the union's treatment of her grievance was not affected by her conduct.

18. Mr. Holmes testified that the decision to support Ms. Henry, rather than Ms. Costa, was consistent with past practice and that taking Ms. Costa's grievance to arbitration was not consistent with the collective agreement. Not supporting Ms. Henry would create problems in Mr. Holmes' view since anyone with seniority would take any job he or she liked; there would be no protection for employees already within a classification in which a vacancy occurs. Counsel for Ms. Costa asked Mr. Holmes if he thought that Ms. Costa's attempt to arbitrate her grievance was causing dissension among the employees. Mr. Holmes replied that there was no objection to arbitrating it, that "we thought of all the possibilities" and that if the committee of stewards had said arbitrate, "that would have been it". Mr. Holmes agreed with counsel that the issue was a much larger problem than whether Ms. Costa got the job; counsel then suggested that the union had taken the position of least difficulty, the course of least resistance. Mr. Holmes said that the union has to cater for 400 odd persons on the plant, not just one.

19. Mr. O'Brien did not believe there was a vacancy since Ms. Henry was filling the classification (albeit on a temporary basis while Ms. Parvao was away). For there to be a vacancy, in his view, Ms. Henry would have to be laid off and then she would have to be recalled in accordance with the collective agreement. He expressed concern for the ramifications of giving Ms. Costa the job. He thought that if Ms. Henry were not entitled to the day shift in that classification, that would have destroyed the whole understanding with the company. Without the classification system or practice, there would be a great number of grievances as people sought jobs solely on the basis of seniority in the plant. Mr. O'Brien was asked by counsel for Ms. Costa whether it would not benefit the rest of the employees to clarify the matter; Mr. O'Brien stated that if the grievance had gone ahead, it would have gone ahead on something that did not occur, that is, a vacancy in the position of inspection floor machine operator. When the union goes to arbitration, he said, it has to know that there is really a case. If Dr. Blacha had allowed the grievance, the union would have arbitrated because Ms. Henry would have filed a grievance. While there may well be a matter of policy involved, section 68 does not require the union to proceed with a grievance solely to determine a policy issue, where the requirements of the section are otherwise met. The fact that the employer denies a grievance but for some reason still wishes to proceed does not bind the union to proceed if it is satisfied with the outcome of the grievance at the third stage. As far as the union was concerned, there was no problem with the policy; it worked as well as possible and benefited more employees than not; there was therefore no reason for the union to expend union

resources on proceeding with the grievance. Counsel for Ms. Costa cited the following passage from *Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500* (Simmons), *supra*, to support his contention that the union had an obligation under the circumstances of this case (specifically that Dr. Blacha and two stewards did not agree with the view of Mr. Holmes and Mr. O'Brien) to continue with the grievance:

It is therefore obvious that the issue has not been clearly resolved in favour of either party's point of view but remains an open one. We have concluded, not without difficulty, that the issue in the instant situation is not moot and that the grievor is entitled to receive a decision on the merits of his claim. There are two basic reasons for our decision. One, at the time of filing the grievance the grievor was directly affected by the decision of the employer and had a valid (as opposed to a hypothetical) complaint because of same. While he does not now seek the position for which he claimed in his grievance, we are unable to conclude that he no longer has any interest in having the complaint determined through arbitration. There has been no settlement of his complaint *per se* and because of the evidence presented in this connection it would be dangerous for this board to conclude that his complaint had disappeared in all respects. Secondly, it is this board's view that in the absence of a settlement, all valid (as that word is intended to be interpreted) grievances should be resolved through arbitration.

In the instant case, Ms. Costa's grievance had been settled; it had been denied by the company and the union determined it was not appropriate to proceed to arbitration. Ms. Costa's right does not extend to a right to proceed to arbitration; it extends under section 68 only as far as requiring the union to make its decision in good faith, without discrimination and in a non-arbitrary manner. Section 68 does not curtail the union's right to settle grievances, even if the employee does not wish it settled: *Chrysler Canada*, [1980] OLRB Rep. May 650. The fact that Dr. Blacha has some concerns about the application of the policy and that two stewards supported Ms. Costa's position does not mean that the grievance "remains an open one". The issue remains open in the minds of some of the participants, apparently, but Ms. Costa's grievance has been settled with both relevant parties, the employer and the union, agreeing on the result. Furthermore, in *Re International Nickel* (Simmons), *supra*, it was the union which sought a decision on the merits on behalf of the individual grievor, obviously a major distinction from the case before the Board.

20. The efforts made by Mr. Holmes and Mr. O'Brien were more than perfunctory. They held a third step meeting with Dr. Blacha; they explained their position to Ms. Costa; they considered the impact of pursuing Ms. Costa's grievance, including the effect on other employees, the chances of Ms. Henry filing a grievance and the ramifications for the policy which had been developed with the company. They took the matter to a stewards' meeting. It cannot be said that there was not a cogent labour relations reason for not pursuing Ms. Costa's grievance (and, in reverse, indicating a willingness to proceed with a grievance filed by Ms. Henry should she not be given the position and filed a grievance); the arrangement between the company and the union and the union's application of it in this case are not unreasonable: *Dixie Canada Inc.*, [1984] OLRB Rep. Sept. 1179, at paragraph 42; *Seagram Company Ltd.*, *supra*, at paragraph 15. Favouring one employee over another, particularly where the union's interpretation of the collective agreement is not so unreasonable as to be considered arbitrary is not in itself a contravention of section 68: *J. Lewis Humphreys and Service Employees Union Local 204 A. F. of L. - C.I.O., C.L.C.* (1983) 2 CLRBR (NS) 350 (a case in which the union represented one grievor at arbitration but not the other employee seeking the same position).

21. It seems clear that all Mr. Holmes was doing in agreeing with Ms. Henry's position was reminding Dr. Blacha that there was a practice agreed to by both parties which had not been followed when Ms. Costa had been given the position. The Board has said that a union does not contravene section 68 when "it acts to correct a mistaken interpretation of the collective agreement": *Seagram Company Ltd.*, [1982] OLRB Rep. Oct. 1571. Labour relations reality requires that that

same principle be applied to a policy or practice developed between the employer and the union which complements the collective agreement, although technically outside it, as long as the policy or practice does not itself contravene section 68: *Donald McConvey*, [1986] OLRB Rep. June 758. I find that regardless of whether Ms. Costa or Ms. Henry filled the job, the union would be asked to file a grievance. The testimony of both Mr. Holmes and Mr. O'Brien satisfy me that they did consider the ramifications of pursuing Ms. Costa's grievance and decided that to continue to follow the practice was the appropriate decision to make. That meant they could not take Ms. Costa's grievance to arbitration; but it would require them to pursue Ms. Henry's likely grievance should Ms. Costa remain in the job. The fact that two stewards disagreed with this position does not affect the question of whether these two officials directed their minds to the issue. Nor do I accept counsel for Ms. Costa's contention that the union should have arbitrated the grievance in order to obtain an external determination of the matter. That is entirely a matter for the union to decide and here it was decided there was nothing to arbitrate. In the union's view, the practice which had been developed protected employees and was a curtailment, outside the strict confines of the collective agreement, on management rights to move people from shift to shift. The policy was for the benefit of all employees; to pursue Ms. Costa's grievance would have undermined that policy, even if it did not create the massive problems envisaged by Mr. Holmes and Mr. O'Brien. Regardless of the decision made by the union in this matter, at least one and probably many more employees would believe themselves to be disadvantaged. The union knew this and took it into consideration in reaching its decision. It believed that in applying the policy, they were acting consistently and in the best interests of the employees in the bargaining unit.

22. For the foregoing reasons, this complaint is dismissed.

1374-86-R Toronto-Central Ontario Building and Construction Trades Council and The International Union of Bricklayers and Allied Craftsmen, Local 2, Applicants, v. **Elmont Construction Limited**, Bruce N. Huntley Contracting Limited and 482575 Ontario Limited, Respondents

Practice and Procedure - Settlement - Parties to minutes of settlement wishing to have Board make orders must indicate orders to which they have agreed - Agreement must also stipulate the existence of factual elements that give Board the jurisdiction to make the orders requested

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *J. Wilson* and *R. R. Montague*.

DECISION OF THE BOARD; February 10, 1987

1. The Board, by decision dated December 18, 1986, set out the Minutes of Settlement entered into by the parties in the decision and terminated the proceedings.

2. Counsel for the applicant has applied to the Board for reconsideration and has requested the Board to vary paragraph 2 of the decision "... by issuing the Minutes of Settlement as a decision of the Board as requested by the parties in paragraph 6 of the said Minutes rather than by terminating the application." Counsel also advised the Board that the signatory on behalf of the Toronto-Central Ontario Building Trades and Construction Council was Mr. Tony Michael, the business manager of the Council.

3. Paragraph 6 of the Minutes of Settlement stated:

“The parties request that these Minutes of Settlement be issued as a decision of the Board in settlement of this matter.”

The Minutes of Settlement did not request that the Board make any orders or declarations. Indeed, paragraph 3 of the Minutes of Settlement contemplates that the respondents are deemed to be associated or related businesses under section 1(4) of the Act and are to be bound by a collective agreement only if one of the respondents engages in the construction industry in the future. The Board interpreted paragraph 6 of the Minutes of Settlement as simply requesting the Board to copy out the terms of the Minutes of Settlement in decision. We did not understand the parties to be asking the Board to make any orders or declarations.

4. If the parties to Minutes of Settlement or other agreements settling matters before the Board wish to have the Board make orders or declarations, they must, at the very least, indicate the orders or declarations to which they have agreed. Additionally, the Minutes of Settlement or other agreement must stipulate the existence of the factual elements that give the Board the jurisdiction to make the declarations or orders requested. If the parties cannot set out with some degree of specificity the orders or declarations that they wish the Board to make, the Board is not prepared to speculate about the orders or declarations that the parties have agreed the Board should issue. This is particularly so in this case where there appears to be a conditional agreement to a declaration and an undertaking to pay money. There was no reference to any agreed facts from which the Board could find the jurisdiction, other than the fact of an agreement, to make any orders or declarations.

5. In our view, the Board's decision of December 18, 1986 reflects the agreement of the parties, as set out in the Minutes of Settlement.

6. We do vary the Board's decision by hereby stating that Tony Michael executed the Minutes of Settlement on behalf of the Toronto-Central Ontario Building and Construction Trades Council.

7. The request for reconsideration is hereby dismissed except for the variation described in paragraph 6 above.

0254-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Etna Foods of Windsor Limited, Respondent

Certification - Constitutional Law - Whether Board has constitutional jurisdiction over labour relations relating to the respondent's fish processing business - Respondent operating trucks which transport fish exports to the U.S. - Most government regulations with respect to fish processing under federal jurisdiction - Board finding it has constitutional jurisdiction - Certificate issuing

BEFORE: *V. Solomatenko*, Vice-Chairman, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Laurence C. Arnold* and *Mike Darnell* for the applicant; *R. G. McLister* and *Vito Peralta* for the respondent.

DECISION OF THE BOARD; February 26, 1987

1. This is one of four applications for certification filed by the applicant on April 25, 1986. At the time, the applicant had not been previously found by the Board to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. All four applications were scheduled for hearing on May 16, 1986, at which time a differently constituted panel of the Board received evidence and argument from all parties to the four applications with respect to the issue whether the applicant was a trade union within the meaning of the Act. By its decision of June 18, 1986, the Board found that the applicant became a trade union within the meaning of section 1(1)(p) of the Act as of April 21, 1986: *Etna Foods of Windsor Limited*, [1986] OLRB Rep. June 710. The same decision referred the four applications to the Registrar to be listed for hearing for purposes of hearing evidence and representations of the parties with respect to all outstanding matters.
2. The instant application was scheduled for hearing before this panel. At the outset of the hearing, counsel indicated that the respondent was challenging the Board's constitutional jurisdiction to deal with this application. He also argued that the hearing be adjourned and rescheduled to allow the parties to all four applications to present evidence and make representations in the course of a single proceeding with respect to the issue of constitutional jurisdiction. The respondent's position in this regard was that there was agreement amongst the parties that the question of the Board's constitutional jurisdiction be dealt with in one hearing involving all parties to the four applications. The applicant, on the other hand, denied the existence of any such agreement.
3. The respondent had not filed any material prior to the hearing to indicate that it was challenging the Board's constitutional jurisdiction to determine this application. The Board's decision of June 18, 1986 does not indicate the existence of any agreement to have all four applications set down for a single hearing in respect of the outstanding issues. Furthermore, there was nothing filed subsequent to the notice of this hearing to advise the Board that further hearings should be scheduled to include the parties to all four applications. Having regard to the parties' submissions and the materials filed with the Board, we could not find that there existed extenuating circumstances as would cause the Board to exercise its discretion to grant an adjournment in the absence of the parties' agreement thereto.
4. The respondent's request for an adjournment was denied and the hearing proceeded for purposes of receiving evidence and representations with respect to all outstanding matters arising out of this application, including any challenge that the respondent wished to raise to the Board's constitutional jurisdiction. The Board heard the evidence of Vito Peralta, president of the respondent company, and Mike Darnell, president of the union local. Instead of oral argument at the hearing, however, the parties agreed to provide the Board with written submissions with respect to the question of constitutional jurisdiction in accordance with time limits mutually determined at the hearing.
5. The respondent is a provincially incorporated company which carries on a fish processing business at Leamington, Ontario. It is that location which is subject of this application, but the respondent also operates a retail store in Windsor, which currently employs two persons, as well as a retail and processing outlet in Port Stanley which is non-operational at present. The respondent normally employs approximately 60 to 65 employees. At the relevant time, there were 56 employees located at the Leamington plant, of whom 10 were supervisory and management staff, 32 were filleters, 8 were material handlers and 6 were office staff. Only the filleters and material handlers are subject of this application. The fish processing operation involves the cleaning, weighing and packaging of fish. About 90 to 95 per cent of the respondent's product is exported to the United States. In the past twelve months, the respondent has purchased fish or fish products in total

amount of \$4 to \$4-1/2 million, of which \$3 to \$3-1/2 million was purchased in Ontario. Approximately \$1/2 million of fish was purchased from outside the county and the rest was purchased from other parts of Canada. Some portion of the fish products that the respondent imports is also re-exported.

6. The respondent owns and operates four pick-up trucks and three larger refrigerated trucks which are used for purposes of delivery and pick-up of fish in connection with its processing business. All trucks are provincially licensed and, where necessary, have the permits required for purposes of transporting between Canada and the United States. Two of the larger refrigerated trucks are regularly used to transport the respondent's fish exports to the United States and also to take delivery of fish products it is importing from the United States. The third refrigerated truck is a back-up vehicle. Although there are several persons, including Mr. Peralta, who on occasion will drive all of the vehicles, there are two drivers who regularly operate the two larger refrigerated trucks. One of these drivers spends approximately 50 to 60 per cent of his working time in driving to the United States and the other driver spends approximately 60 to 75 per cent of his time in this activity. On occasion, these drivers complete the requisite import and export documentation. On a regular basis, however, the import and export documentation is prepared in the respondent's office. There was no evidence that any of these vehicles were used for transporting fish or fish products other than for purposes of the respondent's own processing operation.

7. Mr. Peralta's evidence is that virtually all of the applicable government regulation with respect to fish processing is under federal jurisdiction. That regulatory activity relates to such matters as weighing fish, bacteria count, packaging, the freezing and glazing process, coding the packages with respect to quantity of fish, import and export matters, and customs. He notes that he regularly reports the company's sales to Environment Canada and the company is visited by representatives of the federal Ministry of Environment, Revenue Canada, Customs and Excise, and Fisheries and Oceans. Some of the enforcement function under the federal *Fisheries Act* is delegated to the provincial Ministry of Natural Resources and there is therefore some interaction with provincial government representatives as a result. The respondent also has a licence as a fish processor which is issued under the authority of the federal Ministry of Fisheries and Oceans.

8. Mr. Darnell was a commercial fisherman for nine years and has been with the union on the western coast of Canada since 1972. It is his evidence that he has personally been involved with organizing fish processing plants in British Columbia and certification was granted under provincial legislation in all cases. The union has submitted samples of British Columbia certification for canneries, fish camps and plants dating back to 1944. Mr. Darnell states he is not aware of any constitutional challenge to British Columbia's jurisdiction to certify fish processing operations. It is also his evidence that all processing plants he was involved with are similar in operation. He includes the respondent in that category although, as the respondent notes, Mr. Darnell has never been employed by the respondent and thus is not able to give any direct evidence regarding its processing operation. It is also Mr. Darnell's evidence that, as an officer of the union, he meets regularly with the standing committee on fisheries in Ottawa, as well as other industry sources. On the basis of the information so received, it is his understanding that most - and in the case of catches such as hearing, virtually all - of B.C.'s fish catch is exported by various means of transport.

9. The general rule of constitutional jurisdiction over labour relations matters has been stated as follows by the Supreme Court of Canada in *Four-B Manufacturing Limited v. United Garment Workers of America and Ontario Labour Relations Board*, [1981] S.C.R. 1031, at page 1045:

...With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature

of their operations and their normal activities, can be characterized as federal undertakings, services or businesses:...

Thus, the inquiry into whether the Board has constitutional jurisdiction over the labour relations related to the respondent's business must begin with the initial question whether its fish processing operations constitute a federal undertaking, service or business.

10. Section 91 of the *Constitution Act, 1867* (hereinafter referred to as the "*Constitution Act*") grants Parliament exclusive legislative authority in respect of certain subject matters. The respondent argues that its fish processing business is a federal undertaking by virtue of sections 91(2) and 91(12) of the *Constitution Act* which grant Parliament the exclusive authority:

...to make Laws for the Peace, Order, and good Government of Canada, in relations to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, -

...

2. The Regulation of Trade and Commerce.

...

12. Sea Coast and Inland Fisheries.

The respondent's main argument is based on the power granted to Parliament under section 91(12) to enact legislation with respect to "inland fisheries". Its argument in the alternative, however, is that even if fish processing by itself does not come within section 91(12), the processing together with the importing and exporting activities bring its marketing of fish under section 91(2) of the *Constitution Act* which deals with the regulation of trade and commerce.

11. Counsel for the respondent has referred the Board to a number of federal statutes or regulations which contain some reference to fishing and fish processing. For example, section 3(1) of the *Fisheries Development Act*, R.S.C. 1970 c. F-21 provides:

The Minister may undertake projects

(a) for the more efficient exploitation of fishery resources and for the exploration for and development of new fishery resources and new fisheries;

(b) for the introduction and demonstration to fishermen of new types of fishing vessels and fishing equipment and of new fishing techniques; and

(c) for the development of new fishery products and for the improvement of the handling, processing and distribution of fishery products.

It was also noted that section 5 of the same Act allows the Minister to make payments for the construction and equipment of commercial cold storages and commercial ice-making and ice-storing facilities. The *Fisheries Act* was amended in 1985 and counsel notes that the following definition of "fishery" becomes effective January 1, 1987:

"fishery" includes

(a) the places in Canadian fisheries waters where, and the times when, fishing and related activi-

ties occur, including such packing, transporting and processing operation as are within the jurisdiction of Parliament, and

(b) the persons engaged and the fishing vessels, fishing gear and other equipment used in the activities referred to in paragraph (a).

He argues that the reference to “processing operation” in paragraph (a) must also refer to on-shore processing operations and activities such as engaged in by the respondent.

12. The conclusion urged upon us by the respondent is that all regulatory authority regarding fishing resides with the federal government. Essentially, the argument is that these numerous federal statutory references to fish processing support as the proposition that Parliament’s power under section 91(12) of the *Constitution Act* with respect to fisheries includes the exclusive legislative authority over fish processing and by necessity, labour relations related to fish processing. The respondent argues further that provincial jurisdiction of fisheries has been limited to a narrow proprietary interest. In this respect, counsel refers to *Attorney General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* [1898] A.C. 700 (P.C.) (*The Fisheries Reference*), which involved the question of ownership of lake and river beds in the context of Parliament’s authority to grant licences to fish in those waters. It was argued that the *Fisheries Reference* stands for the proposition that only matters of proprietary rights, which are under provincial jurisdiction, are excluded from the fisheries powers under section 81(12) of the *Constitution Act*.

13. The question of Parliament’s legislative powers with respect to fisheries and fishing was extensively reviewed in a recent decision of the Board wherein it was held that the Board has constitutional jurisdiction with respect to labour relations matters related to the employment on fishing boats: *Omstead Foods Limited et al. and Great Lakes Fishermen Allied Workers Union*, [1986] OLRB Rep. Dec. 1691. The respondents in the *Omstead Foods* case also had argued that the provincial jurisdiction with respect to fisheries was narrowly limited to a matter of proprietary rights, similarly relying upon the *Fisheries Reference* case. That argument was rejected by the Board, at paragraph 20 of its decision, as follows:

20. However, in our view, while both the *Fisheries Reference*, *supra*, and [*R. v. Robertson* (1982), 6 S.C.R. 52] were concerned with property in the narrow sense, with proprietary rights, we cannot accede to Mr. Nolan’s interpretation that those cases stand for the proposition that only proprietary rights are excluded from the fisheries power. The statements cited above indicate clearly that the justices in *Robertson*, *supra*, in particular, were addressing themselves not only to the limited question of whether proprietary rights in river beds were transferred to the Dominion by virtue of the grant to the Parliament of the fisheries power, but also to the broader question of the scope of the fisheries power....

14. Whether an undertaking or business, subject to Parliament’s exclusive legislative authority under one of the classes of powers enumerated in section 91 of the *Constitution Act*, necessarily involves the initial determination of the extent or scope of Parliament’s power with respect to that class, the question of the scope of Parliament’s legislative powers with respect to inland fisheries was analyzed in some detail by the Board in *Omstead Foods* (particularly at paragraphs 18 to 26). After reviewing extensively the jurisprudence relative to the issue, including the *Fisheries Reference*, *supra*; *Robertson*, *supra*, *re Fisheries Act, 1914* [1928] 4 D.L.R. 190 (S.C.C.), *aff’d* [1930] 1 D.L.R. 194 (P.C.), *Mark Fishing Co. Ltd. et al. v. United Fishermen & Allied Workers’ Union et al.* (1972), 24 D.L.R. (3d) 585 (B.C.C.A.) and *Gulf Trollers Association v. Minister of Fisheries and Oceans*, [1984] 6 W.W.R. 220 (F.C.T.D.), the Board concluded as follows, at paragraph 26:

We are satisfied on the basis of the authorities cited above, that while the federal power under

section 91(12) of the *Constitution Act* has not been finally determined or definitely delineated, it has been generally and consistently considered to extend only to the preservation of fisheries as a natural resource. The completely open-ended nature of the term "Sea Coast and Inland Fisheries" has of necessity invited judicial interpretation; that interpretation has been consistent with the rationale that as a public resource for the benefit of all persons in Canada, Parliament requires the power to control fisheries in order to conserve and improve the fisheries....

15. The mere fact that Parliament has enacted legislation which contains some reference to fish processing and processors is neither conclusive nor particularly indicative of whether the business of fish processing falls within Parliament's exclusive powers under section 91(12) of the *Constitution Act*. Where courts have reviewed legislation related to fishing, the initial question has always been whether the legislation was intended for the preservation or control of fisheries as a public natural resource. Although the respondent has referred us to these various federal statutes which contain some reference to fish processing, it does not allege that any of that legislation has any other purpose, such as the regulation of fish processing as a business. The jurisprudence is quite clear that the threshold issue for the respondent in the instant case is to establish that its business of fish processing is an undertaking which falls within the scope of protection and preservation of fisheries.

16. Although counsel for the respondent argues that "processing is integral, essential and intimate to fishing and development of the fisheries of Canada", he concedes that the weight of authority supports the applicant's position that fish processing is not a federal undertaking by virtue of section 91(12) of the *Constitution Act*. It has been generally accepted that the issue was settled in the *Fisheries Act* case, *supra*, which dealt with the constitutionality of federal legislation intended to regulate licensing of fish canneries and curing establishments in British Columbia. The respondent in the instant case does not contend that there is any material factual distinction between a fish cannery and a fish processing plant. Instead, counsel argues that the *Fisheries Act* case is distinguishable on several other grounds.

17. In the *Fisheries Act* case, Newcombe J., for the Supreme Court of Canada, stated (at p. 201) that:

...it is undoubted that, in the absence of any restricting consideration, the right to operate a fish cannery for commercial purposes is a civil right in the Province where the operation is carried on, like the right to operate a fruit cannery or a vegetable cannery; and the question, as I see it, is whether the exercise of this right may be restricted or regulated by force of any enumerated Dominion power...

After considering various definitions of "fisheries", Newcombe J. went on to say that neither the business of canning fish nor the operation of a fish canning factory is by any of these decisions comprised in "fisheries" as used in section 91 of the *Constitution Act*. The Privy Council upheld the Supreme Court of Canada decision. It noted that the Attorney General of Canada sought a definition for the word "fisheries" in section 91(12) of the *Constitution Act* "of such amplitude that it will include the operations carried out upon the fish when caught for the purpose of converting them into some form of marketable commodity". The Privy Council rejected that argument and held that:

...In their Lordship's judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "Sea Coast and Inland Fisheries."... (p. 199).

18. The respondent has argued that this portion of the Privy Council's decision is *obiter dicta* because the case is concerned with licensing powers of Parliament and that portion of the

decision does not deal with licensing. It was further argued that the case is distinguishable because the court was concerned with legislative competence with respect to licensing and not with respect to labour relations. Both of those arguments are without merit for similar reasons. Whether the issue is Parliament's power to license or its legislative competence with respect to labour relations, the first question is always the same, that is, what is the scope or nature of the power with respect to the subject or class in question? In the *Fisheries Act* case, Parliament was attempting to license commercial operations, canneries, on grounds that the matter fell within the subject of Sea Coast and Inland Fisheries. The portion of the Privy Council decision which the respondent refers to as *obiter* is in fact the very issue in dispute. Counsel also argues that the *Fisheries Act* case is distinguishable because the definition of "fishery" has been amended (as noted earlier in the decision) and the court in the *Fisheries Act* case was, according to the respondent, focusing on the definition of fishery as it then was under the *Fisheries Act*. We do not agree with that reading of the *Fisheries Act* case. The Privy Council decision (at page 198) does in fact note the definition of "fishery" under the *Fisheries Act, 1914*. But, it goes on to state that "it may well be that this definition is not an apt one to apply to the words Sea Coast and Inland Fisheries in section 91 of the *B.N.A. Act, 1867*". It is clear from the Privy Council decision that it was interpreting the words, "Sea Coast and Inland Fisheries", and not the definition of fishery under the *Fisheries Act*. The interpretation of fishery for purposes of section 91(12) of the *Constitution Act* in the Supreme Court of Canada decision was similarly not based on the definition of fishery under the *Fisheries Act*.

19. In our view, the respondent's situation is not distinguishable from that in the *Fisheries Act* case wherein it was held that the trade processes by which fish are converted into a commodity suitable for marketing cannot upon any reasonable principle of construction be brought within the scope of section 91(12) of the *Constitution Act*. The evidence in this case does not indicate the respondent's fish processing operation to be other than as contemplated by the term "trade processes" in the *Fisheries Act* case. Fish are bought, cleaned, packaged and marketed. The respondent's fish processing operation certainly relies upon the preservation of fisheries as a natural resource, but, in itself it is not an integral part of or necessary to preserving that resource. The fact that the respondent must comply with Parliament's regulations aimed at the protection and preservation of fisheries does not make it an integral part of or essential to that objective. The respondent's objective is to operate as a profitable commercial undertaking which is in essence local work or undertaking within exclusive provincial jurisdiction under section 92 of the *Constitution Act*. In summary, the respondent's fish processing business is not a core federal undertaking under section 91(12) of the *Constitution Act*.

20. As to the submissions with respect to Parliament's legislative authority under the class of Trade and Commerce, counsel for the respondent begins with the proposition that once extra-provincial or international trade is involved, the subject matter is federal and therefore under Parliament's exclusive jurisdiction. In support of that proposition, he relies upon the Supreme Court of Canada decision in *Re The Farm Products Marketing Act, R.S.O. 1950* (1957) S.C.R. 198. We disagree with the respondent's submissions in that respect and concur with the applicant's contention that the *Farm Products Marketing* case would only be applicable if there was an issue of the Province attempting to regulate interprovincial trade. The subject matter in this instance, however, is the respondent's business of fish processing which is in essence a local undertaking and we note that portion of Mr. Justice Rand's decision in the *Farm Marketing Products* case which states (at page 210):

...Processing is one of a number of trade services that may be given products in the course of reaching the consumer: milling (as of grain or lumber), sorting, packing, slaughtering, dressing, storing, transporting, etc. The producer or purchaser may desire to process the product either within or beyond the Province and if he engages for that with a local undertaking (using that expression in a non-technical sense), such as a packing plant - and it would apply to any sort of

servicing - he takes that service as he finds it but free from such Provincial impositions as are strictly trade regulations such as prices or the specification of standards, which could no more be imposed than Provincial trade marks....

[emphasis added]

21. The respondent has attempted to characterize its processing operations as two core federal undertakings: the contracting for the exporting and importing of fish, and the processing of fish for the fulfillment of those international contracts. It was argued that the filleters are integral to and supportive of what has been described as the core federal undertaking of trade and commerce. In other words, the respondent contends that 40 fish plant workers are merely supportive of or incidental to the operations conducted by two truck drivers who only spend approximately 50 to 75 per cent of their time driving and incidental to functions performed by the office personnel with respect to filling out import and export documentation. The conclusion to be borne out on the facts of this case, however, is that the respondent is in the business of fish processing which, in character and function, is not unlike most manufacturing operations. Even if one were to assume for argument's sake that the respondent's trucking operations and import and export activities - both of which are necessary for its commercial viability - fall under federal jurisdiction, it does not change the fundamental nature of its fish processing business. By way of analogy, one might note that the postal service is vital to the commercial viability of a business involved with the advertising and distribution of products through the mails. However, that reliance upon the postal service, which is a federal undertaking, does not change the fundamental character of the mail order business. Similarly, the respondent's dependence on its trucking and import and export activities does not alter the basic fact that it is a commercial undertaking which purchases fish to be processed then sold for profit.

22. Anticipating the argument from the applicant that the respondent's filleters are not directly involved in the transport activities or extra-provincial agreements and relationships, counsel relies upon the following cases for the proposition that a direct involvement by employees is not required: *Arrow Transfer Company Limited*, [1974] 1 C.L.R.B.R. 29 (B.C.) and *Letter Carriers Union v. Canadian Union of Postal Workers and M & B Enterprises Ltd.* [1974] 1 W.W.R. 452 (S.C.C.); (1973) 40 D.L.R. (3rd) 105. The governing principles of those cases, however, are not applicable to the respondent's circumstances. In each of those cases there was no question that some federal undertaking was involved. In *Arrow Transfer*, the federal undertaking was that of an extra-provincial carrier and the question was whether the mechanics employed by the carrier would be subject to federal jurisdiction. It was held that the maintenance operation was an integral part of the trucking operation and, therefore, the maintenance mechanics were also subject to the federal labour legislation. In the *Letter Carriers Union* case, the employees of an independent trucking company, which handled and collected mail under contract with Canada Post, worked exclusively within the provincial jurisdiction and occasionally performing work for persons other than Canada Post. These employees were held to be subject to federal labour legislation because the main and principle part of the trucking company's business was vital or essential to a federal undertaking. In the respondent's case, however, there is no initial core federal undertaking and, as a result, the principles enunciated in *Arrow Transfer* and the *Letter Carriers Union* case simply are inapplicable.

23. As for the extra-provincial trucking operations engaged in by the respondent, the Board has, on numerous occasions, dealt with the issue of trucking facilities in connection with a manufacturing or processing operation. In *Humpty Dumpty Foods Ltd.*, [1979] OLRB Rep. April 315 the Board had to deal with the jurisdiction of employees of a wholesale distribution snack food operation which delivered its product from its warehouse in Ottawa into Quebec. The Board in

that instance referred to a review of its relevant jurisprudence as set out in *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083, wherein it was stated:

In the past this Board has been required to determine whether a manufacturing operation with trucking facilities would be held to be one undertaking and, if so, whether it would be subject to provincial or federal regulation. When a company operates as a common carrier and its business takes it beyond provincial boundaries its labour relations are exclusively under federal jurisdiction. (*Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. H. Ct.)). Where, however, a company is not a common carrier and the essence of its business is manufacturing or processing, the undertaking is within the constitutional jurisdiction of the province for the purposes of regulating its labour relations, notwithstanding that the goods manufactured or processed by the company are sometimes sold outside the province and that the company's delivery facilities extend that far. In other words, where the activity is essentially one of manufacturing and where the manufacture and delivery of goods are integrated activities which are part and parcel of the company's total undertaking, the labour relations of all employees of the company fall within provincial jurisdiction. (*Wm. R. Barnes Company, Ltd.* [1967] OLRB Rep. Sept. 566; *Domtar Limited Trucking Division* [1970] OLRB Rep. July 495; *Crane Carrier Canada Limited* [1970] OLRB Rep. Sept. 665; *Compagnie Miron Ltée.* [1972] OLRB Rep. Dec. 1034 and [1973] OLRB Rep. Jan. 61; *Mason Windows Limited* [1973] OLRB Rep. Oct. 547; *F.B.I. Foods Ltd.* [1975] OLRB Rep. June 522; *Catalano Produce Ltd.* [1975] OLRB Rep. Oct. 743).

In the instant case, the essence of the respondent's activity is that of processing; it is not a common carrier. By its own submissions, the respondent's delivery of fish products extra-provincially is very much a part and parcel of its total undertaking. The respondent's circumstances fall squarely within the Board's previous jurisprudence on the issue.

24. In summary, the respondent's main business is that of fish processing which is subject to provincial jurisdiction as a local work or undertaking. Furthermore, its activity as a fish processor is not an integral part of or essential to some federal undertaking, business or service. We therefore find that the Board has constitutional jurisdiction in this application for certification.

25. The respondent's reply to the application contains a number of allegations and statements set out in Schedule "A" attached thereto. The first two paragraphs of Schedule "A" contain several allegations of obtaining membership evidence by trickery and deceit and by intimidating and coercing workers to join the union. At the hearing, counsel advised that the respondent was withdrawing the allegations set out in the first two paragraphs of Schedule "A". In the third paragraph, the respondent challenged the applicant's status as a trade union within the meaning of section 1(1)(p) of the Act. As previously noted, the Board has found the applicant to be a trade union within the meaning of the Act in its decision of June 18, 1986. The last allegation in Schedule "A" is that the respondent believes that "some of the alleged signatures are not the true signatures of the respective workers voluntarily given, and requires a determination thereof". The Board hereby confirms that it has reviewed the membership evidence in accordance with its usual practices and procedures and is satisfied that the signatures on the membership evidence are in order.

26. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Leamington, Ontario, save and except forepersons, those above the rank of foreperson, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

27. The parties have requested the appointment of a Board Officer to inquire into the duties and responsibilities of Herminia B'or d'Aqua, Tom Carr, Agusta Matias, Maria Murracus, Victor Verissimo and Fatima Zarro. The applicant claims these individuals should be included in the bargaining unit. However, the respondent's claim is that they are forepersons who exercise managerial functions and should be excluded from the bargaining unit by reason of section 1(3)(b)

of the Act. There is no dispute as to the exclusion of forepersons and those above the rank of foreperson from the unit. The question is simply whether these six individuals are so excluded. However, whether they are included or excluded does not affect the description of the bargaining unit. It only affects the number of employees in the unit for purposes of the count.

28. We confirm that regardless whether these six individuals are included in or excluded from the bargaining unit, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 7, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. Where neither the determination of whether the level of membership support is in excess of fifty-five per cent of the employees in the bargaining unit nor the description of the appropriate bargaining unit is contingent on the resolution of the dispute of an individual's status, the Board has exercised its discretion to issue a final certificate: *Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159. In the circumstances of the instant application, we exercise the Board's discretion to issue a final certificate. The question of the status of the six individuals previously named is left to the parties to resolve, either through collective bargaining or by bringing the dispute back to the Board under section 106(2) of the Act which provides:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

If the parties are unable to resolve the question of the status of those six individuals, the Board's assistance in the resolution of that dispute is available under section 106(2) of the Act.

30. A certificate will issue to the applicant.

2909-86-U International Union of Operating Engineers, Local 793, Applicant, v. Gaston H. Poulin Contractor Limited, Respondent

Consent to Prosecute - Right of Access - Respondent denying access to its premises to an official of the applicant in breach of Board's order under s.11 - Board granting consent to prosecute

BEFORE: Ian C. Springate, Alternate Chairman, and Board Members J. Wilson and R. R. Montague.

APPEARANCES: Stephen Wahl, Murray Gold, Jack Slaughter and Ed Kaplanis for the applicant; no one for the respondent.

DECISION OF THE BOARD; February 3, 1987

1. This is an application for consent to institute a prosecution of the respondent for an offence under the *Labour Relations Act*.

2. Although the respondent was notified as to the time and place of the hearing scheduled to deal with the application, no one attended at the hearing on behalf of the respondent.

3. On October 23, 1986 the applicant filed an application for right of access under the provisions of section 11 of the Act. A hearing was held into the application on November 27, 1986. Prior to the hearing, the parties reached agreement that the Board should issue a direction pursuant to section 11 and also agreed to most of the terms of the order. The parties were in dispute, however, on when the access order should become effective. After hearing the evidence and representations of the parties with respect to this issue, the Board ruled orally that the access order should become effective November 27, 1986. The order was affirmed in a written decision dated December 31, 1986, [1987] OLRB Rep. Jan. 48.

4. With respect to the instant application, the applicant's filings allege that on January 21, 1987 and again on January 22, 1987 an official of the applicant sought to gain access to the respondent's premises in accordance with the terms of the Board's order, but was denied access. At the hearing, the applicant contended that a union representative had also been denied access on January 23, 1987. Section 96(2) of the Act specifies that each day an order of the Board is contravened constitutes a separate offence. Given that the respondent was not put on notice that the applicant would be seeking the Board's consent to prosecute it with respect to a third alleged breach of the Board's order, we are of the view that it would be inappropriate to deal with the alleged breach on January 23, 1987.

5. At the hearing the applicant led evidence sufficient to establish a *prima facie* case that on January 21, 1987 and again on January 22, 1987 the respondent denied access to an official of the applicant in breach of the Board's order under section 11 of the Act. We believe it appropriate for the Board to grant its consent to a prosecution of the respondent for these alleged contraventions of the order.

6. The appropriate documents will issue.

3106-85-R International Brotherhood of Painters and Allied Trades- Local Union 1891, Applicant, v. Gilvesy Enterprises Inc., Respondent

Bargaining Unit - Certification - Construction Industry - Whether drywall tapers employees or independent contractors - Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count - Board suggesting use of a "representative period" be eliminated

BEFORE: *G. T. Surdykowski*, Vice-Chairman and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *Murray Gold* for the applicant; *Mary Ellen Cummings* and *Oscar Leguin* for the respondent.

DECISION OF THE BOARD; January 30, 1987

1. The name of the respondent is amended to read: "Gilvesy Enterprises Inc.,".

2. In this application for certification, the applicant seeks to represent a bargaining unit of painters and painters' apprentices employed by the respondent in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin (that is, Board Area 3), excluding the industrial, commercial, and institutional sector save and except non-working foremen, and persons above the rank of non-working foreman, together with a clarity note specifying that "all painters" in the bargaining unit includes drywall tapers. The respondent asserts that "dry-wall tapers" should be substituted for "painters and painters' apprentices" in the description (which would eliminate the need for a clarity note).

3. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is made pursuant to section 144(1) of the Act.

4. On the basis of the information before the Board, we find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on March 29, 1978, the designated employee bargaining agency is the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades.

5. The respondent filed two replies, the second amending the first, and a list of employees as required by the Board's Rules of Procedure.

6. The respondent's list as filed contains the names of three employees on Schedule "A". The applicant disputed the correctness of this list and accordingly a Labour Relations Officer was appointed to inquire into and report to the Board with respect to the list and composition of the bargaining unit in order to permit the Board to determine the relationship between the respondent and the persons alleged by either party to be in the bargaining unit. The Officer convened meetings between the parties on April 24, June 10, and June 25, 1986. At the applicant's request, the Board heard the representations of the parties with respect to the Officer's report on November 24, 1986.

7. There are five persons whose relationship to the respondent and inclusion in the bargaining unit is in dispute between the parties. The applicant seeks to have Adrian Spada and Vincenzo Trivisano added to the list. The respondent asserts that these two individuals were independent contractors, not employees. In addition, the applicant seeks to have the individuals identified as Angelo Brum, Larry Poulin and Cecil Simmons deleted from the list on the basis that they were not employees of the respondent or, alternatively, that they do not fall within the bargaining unit applied for. The respondent takes the contrary position.

8. On the evidence contained in the report of the Labour Relations Officer, it is clear that the respondent had the same relationship with both Mr. Trivisano and Mr. Spada. Both men were employed by Central Drywall, a subcontractor of the respondent on a job site at the Oxford County Board of Health Building in Woodstock, until that company went into bankruptcy in early March, 1986. Both men remained on the job site after Central Drywall had ceased operating at the request of the respondent which did not then have a sufficient number of employees on the job site to complete the work itself. The evidence of its president, Mr. Legein, who did not attend at the job site at any material time, was that the respondent intended to secure the services of Messrs. Trivisano and Spada as independent subcontractors, not employees, and that to that end it obtained no T-1 income tax information forms from them, paid them out of the company's general ledger (as opposed to payroll) account without any of the usual employee deductions or payments and does not intend to issue any T-4 statements of employment earnings for income tax purposes.

However, neither Trivisano nor Spada, nor anyone on their behalf, agreed to continue with the work they had previously done as employees as independent subcontractors. Indeed, the matter was never discussed, directly or indirectly. The only matters that were discussed and agreed to were that the two men would continue to do the same work that they had done as employees of Central Drywall and that they would do so in return for the same "remuneration" as before. From the perspective of Messrs. Trivisano and Spada, neither of whom ever worked as anything other than an employee prior to this, everything continued as before, except that, beginning March 3, 1986, they were employed by the respondent.

9. In a subcontract arrangement one would expect to find some stipulation with respect to the supply of materials, the period within which the work subcontracted for is to be completed, and the amount to be paid for the completed work. In this case, there were none of those things. Instead, Trivisano and Spada were engaged to complete the work they had been doing for the same remuneration as before, namely \$17.41 plus \$2.50 in "benefits" and 10% vacation pay for each hour worked. There seems to have been little actual bargaining in fixing this hourly rate which was established in discussions between the respondent's project superintendent and, interestingly, a business agent of the applicant and which represents the "union rate" for the job. In this case, the absence of real bargaining resulted from the lack of alternatives available to the respondent. In any event, there was no "chance of profit" or "risk of loss" to either Trivisano or Spada in the commercial sense of those phrases. Further, there is no cogent evidence to suggest that the respondent's power over Trivisano and Spada was in any way limited. On the contrary, the evidence disclosed that the respondent exercised a significant measure of general control over the two men. Trivisano and Spada worked the same regular hours as Gilvesy employees on the job site and the respondent expected and received continuous and uninterrupted production from them. The hours worked and payments due to them were recorded by the respondent's project superintendent on "invoices" which are headed "Gilvesy Construction Limited". Blank "invoices" were presented to Trivisano and Spada and they filled in their name, designation "drywall taper", sometimes their social insurance number, signed the document and returned it to the superintendent who filled in the balance of the information. Further, what work was to be done by Messrs. Trivisano and Spada was directed in a general way by the respondent although, as one would expect with experienced tradesmen, there was little direct supervision of the actual work performed by them. In addition, unlike true independent contractors, Trivisano and Spada were not free to hire another person to do the work they were allegedly "subcontracted" to do as indicated by the evidence of Mr. Leguin who, when asked if they could have done so, replied in the negative as follows:

Not really, because they were subcontracted to do the work. They could have suggested names, and we may have subcontracted with these other people.

10. Trivisano and Spada do own the hand tools they use to do drywall taping. However, these are minor in nature and the evidence suggests that most drywall tapers own such tools whether they are employees or not. On the other hand, and unlike the situation with subcontractor Central Drywall, other equipment, such as scaffolding and ladders, was supplied by the respondent and though the actual source of the materials that they used is obscure, this too was obtained from the respondent as opposed to being supplied by Trivisano or Spada. Finally, the unilateral termination of Trivisano and Spada by the respondent when there was still drywall taping work to be done is inconsistent with an independent subcontract relationship and indicates the degree of power wielded over them by the company.

11. It was also suggested that because Trivisano and Spada knew what the arrangements were and that the respondent considered them to be independent contractors, the applicant is pre-

cluded from suggesting that they were not in this proceedings. The applicant was, in law, a stranger to the relationship between the two men and the respondent and is neither estopped nor otherwise precluded from raising the issue. In any case, the uncontradicted evidence of both Messrs. Trivisano and Spada is that each of them raised the matter with the respondent's superintendent. We are satisfied from the evidence that neither man indicated any acceptance of the respondent's characterization sufficient to ground an estoppel or other like doctrine even if it would otherwise apply.

12. In determining whether a person is an employee or an independent contractor for labour relations purposes, the Board concerns itself with the substance of the working relationship and not its mere form or label. In assessing the true nature of the relationship, the Board applies the fourfold test set out in *Montreal v. Montreal Locomotive Works Ltd. et al.* [1947] 1 D.L.R. 161 (at 169) in the context of the overall organization of the operation in question, the organization test being one that was applied in *Meyer v. J. P. Conrad Lavigne Ltd.* (1980), 27 O.R. (2d) 129 (Ont. C.A.) at page 132-133 (see also *Brantwood Manor Nursing Homes Limited* [1986] OLRB Rep. Jan. 9; *Babco Plumbing Services Limited*, [1985] OLRB Rep. Dec. 1693; *K-Mart Canada Ltd.*, [1983] OLRB Rep. May 649 among others). In our view, an application of both the "fourfold" test and the organizational test to the circumstances of Messrs. Trivisano and Spada yields the same result and we are compelled to conclude that both men were employees of the respondent at all material times, including the application date, March 18, 1986. Consequently, both are properly included on the list of employees, regardless of which bargaining unit description is the correct one.

13. The evidence discloses that Larry Poulin was hired to do and did do drywall taping work at the Oxford County Board of Health job site for the ten days, up to and including March 18, 1986. During that time he did nothing but drywall taping work at a special hourly rate of \$12.00 (being \$1.00 per hour more than a labourer's rate and \$1.00 per hour less than a carpenter's rate for that job site). He had previously been employed by the respondent from October, 1979 to 1982 during which time he divided his time evenly between drywall work and labourers work.

14. Angelo Brum has been employed by the respondent since late May 1980. Over the years he has done a variety of jobs including form work, pouring concrete, finishing cement, carpentry, cleaning, general help, and drywall taping. On the date of application, Mr. Brum was working at a Bell Canada job site in London at the labourer's rate of \$11.00 per hour. Although the evidence is less than clear, Mr. Brum's uncontradicted evidence is that the week in which this application was made was at the beginning of a two to three month period that he spent on that job. On the evidence before us, we are satisfied that, prior to and on March 18, 1986, Mr. Brum spent the majority of his time at the Bell Canada job site doing drywall taping work.

15. Cecil Simmons was hired by the respondent some eight or nine years ago. Prior to working on the Oxford County Board of Health job, he spent ninety to ninety-five percent of his time doing traditional labourer's work, such as stripping forms and digging holes, although he did do some drywall taping as well, usually on small jobs. On the Oxford County Board of Health job, however, on which he spent three to four weeks (including the date of application), he spent his time prior to and on the date of application doing drywall taping work. He was paid the labourer's rate of \$11.00 per hour.

16. In applications for certification in the construction industry, a person must be at work on the date of application in order to be included in the bargaining unit for purposes of "the count" (see for example, *Smiths Construction Company Arnprior Limited* [1984] OLRB Rep. March 521). In addition, an individual must be doing bargaining unit work in order to be included in it. In the past, the Board has determined whether an employee is in the bargaining unit by look-

ing at the work that an employee did during the majority of the time on the date of application (see for example *O.J. Gaffney Limited.*, [1964] OLRB Rep. Aug. 233; *McNamara Construction of Ontario Limited*, [1964] OLRB Rep. Dec. 419; *Nedan Forming Company Limited.*, [1965] OLRB Rep. May 100; *Clairson Construction Company Limited*, [1968] OLRB Rep. Apr. 126; *Deer-Mine Services Limited*, [1971] OLRB Rep. June 336; *George and Asmussen Limited*, [1971] OLRB Rep. Oct. 683). Even when an employee was doing the work of one classification or craft on the date of application but has previously been engaged in doing the work of several trades or crafts but at the same wage rate, the Board has long been willing to examine a representative period of time prior to the date of application to ascertain what work an individual spends the majority of his time doing and whether or not he/she is properly included in the bargaining unit. (See for example, *Johnson-Keiwi Subway Corporation*, [1966] OLRB Rep. June 182; *Mal-Nicholson Limited*, [1970] OLRB Rep. March 1448; *Heath Construction Inc.*, [1977] OLRB Rep. Oct. 691; *Watcon Inc.*, [1981] OLRB Rep. Dec. 1840; *Des-Build Development Limited.*, [1983] OLRB Rep. Nov. 1793; *Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Di Marco Plumbing & Heating Company Limited*, [1985] OLRB Rep. May 659). It is evident from the decided cases that the "representative period" will vary in length according to the circumstances. For example, the Board has looked at periods of ten days (*Heath Construction Inc.*, *supra*); fifteen days (*J. M. Chartrand Realty Ltd.*, [1978] OLRB Rep. May 423), two weeks (*Di Marco Plumbing & Heating*, *supra*) and one month (*Des-Build Developments Ltd.*, *supra*). It has also be suggested that the Board may look to the primary reason for which the employee was hired to determine his classification (*Pre-Con Murray*, [1965] OLRB Rep. Jan. 1003) although this test has only been applied in limited circumstances where the evidence of what the employee was doing prior to and on the date of application was inconclusive of the issue. (See, *Des-Build Development Limited*, *supra* and *Dufresne Piling Co. (1967) Ltd.*, *supra*).

17. In summary, the previous decisions of the Board indicate that the Board has considered the following criteria in making its determinations:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application; or
- (c) where the person has previously been engaged in the work of more than one trade or craft and the work performed by him/her on the application date does not accurately reflect the work that he/she normally spends the majority of his/her time doing, the work done by the employee during an appropriate representative period prior to the date of application; or
- (d) where there is no conclusive evidence with respect to the work in which an employee has been engaged, any other relevant factor, including the primary reason for hire.

18. The applicant's position is that none of Messrs. Poulin, Brum and Simmons should be included in the bargaining unit applied for because they were originally hired as labourers and that, notwithstanding the work that they may have performed on the date of application, they did not spend a majority of their time doing bargaining unit work.

19. It is clear that all three men were employed by the respondent and at work on the application date. All three spent a majority of their time on that date doing bargaining unit (that is, dry-wall taping) work. In addition Mr. Poulin did nothing other than drywall taping work during the

period of his employment by the respondent. Though the evidence with respect to Messrs. Brum and Simmons is less satisfactory, we are satisfied that, during any period that could be said to be representative prior to the date of application, both men were doing drywall taping work during a majority of the time. In the result, whether one examines only the date of application or some representative period prior to that date, all three are properly included in the list of employees in the bargaining unit.

20. In summary, the Board finds that the list of employees, for purposes of the count, and regardless of the proper bargaining unit description, consists of the following persons who were employed doing drywall taping work on the date of the making of this application for certification, namely:

Angelo Brum,
Larry Poulin,
Cecil Simmons,
Adrian Spada,
Vincenzo Trivisano.

21. In making our determination, we considered the work performed by the persons whose status was in dispute in these proceedings both on the date of application and during a period prior to that date. However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" has tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create, as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his time doing on the date of application; or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

22. In this application for certification the applicant filed documentary evidence of membership consisting of two combinations applications for membership and receipts. The combination applications for membership contained the original signatures of two individuals and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal

date established for this application. The cards and money were collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry, which attests to the regularity and sufficiency of the membership evidence. The form and content of the applicant's membership evidence are consistent with the requirements of the Act.

23. The Board finds that the applicant filed evidence of membership on behalf of two of the persons referred to in paragraph 19.

24. The Board is satisfied, on the basis of all the evidence before it, that less than forty-five percent of the employees of the respondent in any bargaining unit that the Board might find appropriate, at the time the application was made, were members of the applicant on March 27, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. The application is dismissed.

1661-85-R The Southern Ontario Newspaper Guild, Local 87, Newspaper Guild, Applicant, v. **Harlequin Enterprises Limited**, Respondent

Bargaining Unit - Certification - Applicant seeking virtual province-wide unit of editorial employees employed at community newspapers operated by respondent - No dispute that departmental-wide unit appropriate - Board sensitive to pattern of distribution and level of employee support - Most comprehensive unit appropriate - Geographic scope of unit covering numerous municipalities

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members G. O. Shamanski and J. Sarra.

APPEARANCES: C. M. Mitchell, G. Lem and J. Andrews for the applicant; Daniel J. Shields, Sherry Joosub and Bruce Annan for the respondent.

DECISION OF THE BOARD; February 3, 1987

1. This application for certification in respect of a unit of editorial employees of the respondent first came on for hearing on October 25, 1985. The application for certification was filed on October 4 and the terminal date fixed as October 17, 1985. The parties were in partial agreement with regard to the bargaining unit description. That is, there was no dispute that a unit composed of editorial employees was appropriate. This acceptance by both parties as to the suitability of a bargaining unit which is department-wide removes this application from the principles articulated in *TV Guide Inc.*, [1986] OLRB Rep. Oct. 1451, with which this Board concurs.

2. Beyond the departmental basis for the bargaining unit, however, there is a dispute as to the appropriate geographic scope. It is useful at this point to briefly sketch the parties' positions. The applicant sought a virtual province-wide bargaining unit or, in the alternative, several bargaining units described in terms of Regional Municipalities or, in the further alternative, bargaining units in respect of each community newspaper operated by the respondent in its Metroland divi-

sion. With respect to the last mentioned alternative, the parties agreed that certain newspapers would be regarded as a "single" community newspaper for bargaining unit description purposes. For example, the Etobicoke Guardian and the Lakeshore Advertiser were to be so "joined", as were the Georgetown Independent and The Acton Free Press. The applicant framed its geographic scope clause in terms of a main submission and two alternative arguments on the basis that it regarded all three configurations as "appropriate" with reference to the Board's jurisprudence, although the applicant's clear preference was for a province-wide unit. The respondent opposed the first two bargaining unit configurations proposed by the applicant but agreed that the second alternative, namely, by each community newspaper (or agreed "pairings") was appropriate. In the respondent's view, the employees did not share a community of interest across the larger units and, further, the respondent relied on the Board's usual practice in restricting bargaining units to municipal-wide bases. At the initial hearing, the employee objectors appeared and concurred with the respondent's position on this aspect of the bargaining unit description. To this, the applicant disputed the asserted lack of community of interest amongst employees and contended that the Board has departed from municipal-wide units in appropriate cases.

3. In its decision dated October 29, 1985, the Board (differently constituted in part) appointed a Board officer to inquire into and report back on the community of interest between the employees for whom certification is sought in the various community newspapers affected by the application. Further, the Board notes that the parties were also in dispute as to the appropriate exclusions pursuant to section 1(3)b) of the *Labour Relations Act* other than "publisher" and "editor" (described by different titles) which were agreed exclusions. Finally, the applicant sought an "all employees" unit and the respondent wished the usual exclusion of "part-time employees" and "students employed in the school vacation period". A Board Officer was appointed to inquire into these disputes as well.

4. These examinations consumed many months. The certification application came back on for hearing on September 12 and September 14, 1986. At that time, counsel for the applicant and the respondent made submissions regarding the Board Officer's report in respect of the geographic scope of the bargaining unit description. In addition to the Board Officer's report, some seventy exhibits were tendered in evidence as well as an agreed statement of facts. Representatives of the employee objectors did not appear at that hearing. This decision only deals with the geographic configuration of the bargaining unit; the "part-time/student" question and the appropriate exclusions pursuant to section 1(3)(b) remain.

5. The Board first sets out excerpts from the agreed statement of facts by way of an overview of that segment of the respondent's operation with which this application deals. Beyond this general background, the Board refers to additional factual findings, as appropriate, in its analysis of the relevant issues. Counsel did address the issue of the credibility of the eight witnesses appearing at the examinations conducted by the Board Officer. In this regard, the Board has reviewed the transcripts of the examinations and weighed and assessed that testimony in the context of the wealth of documentary evidence in reaching its factual findings. However, the Board also notes that much of the factual context for this certification application was not in dispute although the parties obviously argued for different conclusions based on that evidence. Indeed, the Board commends counsel for the exchange of documentation and agreed statement of facts, pursuant to the Board's direction in the October 29, 1985, decision.

6. Those excerpts are as follows (the numerical references are to the items as numbered in the agreed statement of facts):

1. Harlequin Enterprises Limited ("Harlequin") operates a Metroland Printing, Publishing and Distributing Division ("Metroland"). Harlequin is a subsidiary of Torstar Corporation ("Tors-

tar"). Torstar's business is managed through two divisions: 1) newspaper and printing; and 2) book publishing and direct marketing. The book publishing and direct marketing division consists of Harlequin Books and Torstar Books. The newspaper and printing division consists of one daily newspaper, The Toronto Star, and nineteen community newspapers published by Metroland.

2. Metroland was formed in July, 1981 by an amalgamation of Metrospan Printing and Publishing Limited, a Torstar subsidiary which published nine community newspapers, and Inland Publishing Company Limited, acquired by Torstar in February, 1981 and which published thirteen papers at the time of acquisition. Metroland was amalgamated with Harlequin Enterprises in January of 1984. The combined distribution of the Metroland group of community newspaper as of December 31, 1984, was 590,000 copies per week. Exhibit 1 is Torstar's Annual Information Form.

3. The following community publications are published within the Metroland Division; publication days for each publication are shown:

- a) Ajax/Pickering News Advertiser (Wednesday)
- b) The Aurora Banner (Wednesday)
- c) The Brampton Guardian (Wednesday and Friday)
- d) The Burlington Post (Wednesday and Saturday)
- e) The Etobicoke Guardian - The Lakeshore Advertiser (Wednesday)
- f) The Georgetown Independent - The Acton Free Press (Wednesday)
- g) Markham Economist and Sun (Wednesday and Saturday)
- h) The Milton Canadian Champion (Wednesday)
- i) The Mississauga News (Wednesday and Friday)
- j) The Newmarket Era (Wednesday and Saturday)
- k) The Oakville Beaver (Wednesday and Friday)
- l) Oshawa/Whitby This Week (Wednesday, Friday and Saturday)
- m) Richmond Hill Liberal - Thornhill Liberal - Vaughan Liberal (Wednesday and Saturday)
- n) The Scarborough Mirror (Wednesday)
- o) The Stouffville Tribune (Wednesday)
- p) Topic News Magazine (Sunday)
- q) The Willowdale Mirror (Wednesday).

5. Each publication serves and is distributed within a separate community. Publications are not generally distributed outside of the individual community served.

8. Management of each publication establishes the editorial page opinion that will be adopted by the publication.

15. Harlequin holds the copyright for the material published by Metroland Publications.

37. All Metroland newspapers use an identical colour scheme on their banners, red letters on

yellow background, which was adopted simultaneously by all of the publications. All but two of the newspapers state under the banners on the front page that they are "A Metroland Community Newspaper". Each newspaper specifies in its masthead that it is one of the Metroland group of suburban newspapers, followed by a list of other Metroland papers.

7. The Board next sets out the arguments of counsel. Those representations consumed two days of hearing and the Board does no more than relate those able and thorough arguments in a highly abbreviated form.

8. Counsel for the applicant asserted that the geographic scope of the appropriate bargaining unit was determined, as a matter of Board discretion, in light of several, sometimes competing, principles and approaches: is the unit sought "an" appropriate bargaining unit, as contrasted with the "most" appropriate unit, in the specific circumstances of each case; fragmentation and multiplicity of bargaining units are to be avoided and comprehensive units preferred as far as possible but balanced against the consequences of a broadly based unit for the collective bargaining aspirations of employees, particularly in unorganized industries; the unit should be that which best serves the parties' interests in terms of a viable collective bargaining structure. Counsel submitted that, on the instant facts, the community of interest criteria established in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 were, at least, substantially satisfied but, further, consideration of the community of interest amongst the employees in the proposed bargaining unit was only one factor involved in the determination of the appropriate bargaining unit. Counsel acknowledged that there is a Board practice of defining bargaining units with reference to municipalities but asserted the Board has certified units covering single locations within a municipality, several but not all locations within a municipality and units encompassing more than a single municipality, and including regional municipalities. In looking at the appropriateness of broader based units, counsel argued the Board had regard for the extent of union support across the entire area concerned, that is, whether the support was widespread or the particular configuration sought involved an element of "gerrymandering". Finally, on a general level, counsel submitted that the jurisprudence must be placed in the context of the bargaining units sought in each case and the respondent's rationale for opposing that unit. In support of these positions, counsel referred to numerous cases, including: *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266; *The Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430; *Parnell Foods Limited*, [1969] OLRB Rep. Apr. 38; *Ontario Hydro*, [1980] OLRB Rep. June 882; *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459; *The Corporation of the City of Thunder Bay*, [1984] OLRB Rep. May 759; *Niagara Regional Health Unit*, [1975] OLRB Rep. Apr. 376; *The Children's Aid Society of the District of Nipissing*, [1976] OLRB Rep. Dec. 861; *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371; *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250; *Insurance Corporation of British Columbia*, [1974] 1 Can LRBR 403; *Woodward Stores (Vancouver) Limited*, [1975] 1 Can LRBR 114; *National Trust*, [1986] OLRB Rep. Feb. 250; *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; *McDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7; *Industrial Welding Products Co.*, [1985] OLRB Rep. Aug. 1237; *Kuehne & Nagel International Limited*, [1985] OLRB Rep. May 693; *Faber-Castell Canada Limited*, [1986] OLRB Rep. Apr. 449; *Brock Milk Transport Limited*, [1984] OLRB Rep. May 683; *Murray G. Bulger and Associates Limited*, [1985] OLRB Rep. Mar. 458; *Fotomat Canada Limited*, [1979] OLRB Rep. Apr. 306; *Tip Top Tailors*, [1979] OLRB Rep. May 445; *Magna International Inc.*, [1981] OLRB Rep. Sept. 1260; *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293; *T.R.S. Food Services Limited*, [1980] OLRB Rep. Apr. 542; *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262; *The Globe & Mail Limited*, [1976] OLRB Rep. Nov. 662; *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491; *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. June 340; *Dynamic Closures Limited*, [1983] OLRB Rep. Apr. 521.

9. Counsel for the applicant reviewed the evidence in detail. Essentially, it was asserted that the respondent was a corporate organization with a single concept of providing community news through individual community newspapers in and around Metropolitan Toronto. Counsel argued the corporation regarded itself as an integrated structure with a “hands on” president, single marketing strategy, head office control of the individual papers regarding budgets, common payroll, common corporate policies and benefits, regular meetings of publishers and of editors, and central sales office to deal with advertising accounts for the large chains. In this regard, counsel argued that there was evidence of transfers and promotions within the system, shared classified sections and editorial copy and a common salary grid. Thus, it was contended that the forms on “local” news content reflecting each particular community did not, and should not, outweigh the integrative forces. Counsel stressed that the most comprehensive bargaining unit in these circumstances reflected the corporate structure and would not present labour relations difficulties but, rather, would rationalize collective bargaining in respect of editorial employees. Counsel also submitted that bargaining units for editorial employees which were smaller in geographic scope would constitute fragmentation, particularly against the background of other possible bargaining units, including circulation employees, advertising employees, clerical employees and drivers. Finally, the Board notes that, while the bargaining unit was referred to as “virtually province-wide”, the precise unit sought was described in terms of those regional municipalities (with one exception) where the respondent actually operates. The exception referred to the Township of West Guilmory; the applicant accepted the respondent’s assertion that this reference, rather than the “regional municipality” (properly, “County”) of Simcoe, was more appropriate given the geographic area of the County in light of the respondent’s actual operations as at the date of the certification application.

10. Counsel for the respondent likewise reviewed the evidence and referred the Board to a number of authorities in support of its position that the appropriate unit was each community newspaper, with the exceptions already noted in paragraph 1 above. Those references include: *Canadian Gypsum Company Limited*, [1967] OLRB Rep. July 345; *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *Canadian Hanson & Van Winkle Company, Limited*, [1967] OLRB Rep. Nov. 756; *Wittich’s Bread Limited*, [1969] OLRB Rep. Jan. 1019; *Commonwealth Holiday Inns of Canada Ltd.*, 70 CLC ¶16,026; *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491; *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330; *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293; *Weight Loss Inc.*, [1980] OLRB Rep. June 928; *Brock Milk Transport Limited*, [1984] OLRB Rep. May 683; *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637.

11. Counsel for the respondent agreed that the Board had wide discretion in determining the appropriate bargaining unit but stressed that, in exercising that discretion, the Board had developed a practice of certifying along municipal boundaries and single locations. Counsel acknowledged that the Board has departed from that practice but argued that there were no compelling reasons to do so in the instant case. It was asserted that the evidence demonstrated, in the context of the criteria in *Usarco*, *supra*, that the employees did not share a community of interest with other editorial employees outside each individual newspaper and, indeed, given the editorial freedom at the community paper level and the focus on the “local” news, there could be no broad community of interest. In connection with the *Usarco* criteria, counsel also stressed that the evidence of promotion within the corporate structure was not the sort of “transferability” referred to therein under “economic factor” or “functional coherence and interdependence”. Without a common interest, counsel contended that the larger units were inappropriate. In this regard, it was asserted that the “co-operative” efforts amongst newspapers in the past had failed, demonstrating that a larger unit was not feasible. Further, it was submitted those elements of “integration” emphasized by the applicant were either irrelevant, on the basis that these factors did not impact on editorial employees (e.g., common classified sections), or were cost efficient organizational

structures (e.g., common payroll, policies and benefit plan) which did not outweigh the diversity of the various papers or the fact that actual day to day control and decision-making was found at the local level. Counsel sought to distinguish those cases cited by the applicant on various grounds with particular reference to the community of interest criteria and the Board's practice of certifying municipal-wide or single location units. Finally, counsel argued that should a single unit be found appropriate, that unit should be described in terms of municipalities, not regional municipalities (with the exception of the usual reference to the Municipality of Metropolitan Toronto) as sought by the applicant. It was asserted that the Board's practice warranted this result: *National Grocers Company Limited*, [1973] OLRB Rep. May 262., *Wix Corporation*, *supra*.

12. It was not disputed that the Board has a broad discretion in reaching its determination as to the appropriate bargaining unit. It is also appropriate to note that the question of the bargaining unit definition has been often litigated before the Board. Indeed, as stated in *The Hospital for Sick Children*, *supra*:

"...a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer".

In the instant case, as noted earlier, the certification application was filed on October 4, 1985, and first came before the Board on October 25. Examinations before a Board Officer, as directed in the Board decision of October 29, 1985, took several months. The matter was then set down for argument on September 12 and 24, 1986. This delay is all the more troubling in the instant circumstances where the applicant has substantial support across the various community newspapers and is seeking certification on the broadest basis, a configuration which would greatly simplify the future collective bargaining relationship between the parties.

13. The Board is of the view that no useful purpose would be served through an exhaustive analysis of the jurisprudence. The case law has been thoroughly canvassed, in two relatively recent decisions in particular, *The Hospital for Sick Children*, *supra*, and *National Trust*, *supra*. Rather, it is appropriate to summarize those principles for bargaining unit determination which have guided the Board in exercising its discretion, in the context of the certification application now before the Board.

14. The case law recognizes that the Board must determine the appropriate bargaining unit, in accordance with section 6(1) of the Act, in the circumstances of each application but that more than one unit may well be "appropriate" in respect of a single employer: *The Board of Education for the City of Toronto*, *supra*; *Parnell Foods*, *supra*; *The Hospital for Sick Children*, *supra*; *National Trust*, *supra*. In considering the various possible bargaining unit configurations, however, the Board must be sensitive to the impact of that determination on the access by employees to self-organization: *The Board of Education for the City of Toronto*, *supra*; *Tip Top Tailors*, *supra*; *Canada Trustco*, *supra*. This sensitivity led the Board to acknowledge the appropriateness of bargaining units consisting of single plants within a municipality to facilitate collective bargaining in the retail industry in particular: *K Mart Canada*, *supra*; see also *Canada Trustco*, *supra*.

15. Further, the Board recognizes that a multiplicity of bargaining units generally has adverse consequences for the future bargaining relationship of the union and employer, such as, increasing the likelihood of strikes, increased complexity in administering several collective agreements, the triggering of jurisdictional disputes and employee "enclaves" coextensive with each bargaining unit: *Board of Governors of Ryerson*, *supra*; *The Globe and Mail Limited*, *supra*. Con-

versely, broader based units enhance administrative efficiency, employees' lateral mobility and industrial stability and provide a common framework for employment conditions: *Insurance Corporation of British Columbia, supra*; *Ontario Hydro, supra*. Where the more comprehensive unit would not operate to seriously impede or delay employee access to collective bargaining, the Board has favoured the broader grouping: *Board of Governors of Ryerson, supra*; *Stratford General Hospital, supra*. In short, the Board prefers the most comprehensive unit that is viable for labour relations purposes in the context of a policy of facilitating employee access to collective bargaining: *The Corporation of the City of Thunder Bay, supra*.

16. To assist in the determination of the appropriate bargaining unit, the Board has developed the concept of community of interest and the policy of municipal-wide units. Both matters require brief comment.

17. The concept of community of interest was a common sense acknowledgment that it generally made no labour relations sense to "lump together" groups of employees whose interests were so disparate that a bargaining agent could not readily seek to respond to employees' concerns through collective bargaining. The notion of community of interest was itself elaborated and refined into a number of constituent elements, as set out in *Usarco, supra*, including the nature of the work performed, conditions of employment, skills of employees, administration, geographic circumstances and functional coherence and inter-dependence. In *Usarco*, the Board also looked to the centralization of managerial authority, the economic factor and source of work. It must be emphasized, though, that community of interest is not an "all or nothing" phenomenon. Rather, all employees of a single employer share a basic community of interest which increases for various sub-groups of those workers. The question is not "is there a community of interest amongst the employees for whom a union seeks certification?" but "is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?". The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects a sufficient community of interest nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but, rather, goes to the issue of viability: *Niagara Regional Health Unit, supra*; *Bestview Holdings, supra*; *Ponderosa Steak House, supra*. It is the question of viability which is paramount and that may require bargaining units defined in terms of community of interest or some broader reference where sound labour relations policy reasons so require: *The Children's Aid Society case, supra*.

18. The Board's practice of describing the geographic scope of bargaining units in terms of the municipality in which an employer's operation is located must be understood as the Board's mechanism for expeditious resolution of that issue and an effort to strike a rough balance between stable bargaining structures and individual freedom of choice: *K Mart Canada, supra*; *T.R.S. Food Services Limited, supra*. The tradition of regarding municipal-wide units as appropriate has provided considerable certainty in organizing and frequently resulted in the expeditious disposition of certification applications. The jurisprudence on bargaining unit scope, though, has not been static but has evolved. The single-branch unit represented one significant departure: *K Mart, supra*. Likewise, where collective bargaining viability may be achieved through a more comprehensive unit crossing municipal boundaries without unduly restricting or denying employee access to collective bargaining, the Board has departed from its usual policy: *The Board of Health of the York-Oshawa District Health Unit, supra*; *The Globe and Mail Limited, supra*. Generally, the jurisprudence has developed to increase the organizing options available to unions within the context of the other factors bearing on the determination of appropriateness, including viability, fragmentation, etc.: *National Trust, supra*.

19. Turning to the instant facts, the Board starts with consideration of the bargaining unit

sought by the applicant to assess whether that configuration is appropriate in that the employees affected have a sufficient community of interest so that collective bargaining is viable and serious labour relations problems are not thereby created for the employer. The Board stresses that a finding that such a broad based unit is appropriate would not imply that other groupings were "inappropriate" nor would that suggest the Board is about to jettison its existing policies with respect to geographic scope or employee groupings (e.g., office, clerical and technical units).

20. In the Board's view, there is much more than a "sufficient" community of interest to ground a viable collective bargaining structure. Quite simply, the employees have a strong community of interest. The evidence on the community of interest question was voluminous. The Board here refers only to a few examples. To the public, the community newspapers are identifiable as a group by virtue of their common colour scheme on their banners. The editorial page opinion is established at the local level but in the context of the corporate policy of providing "community" news and copyright is held by Harlequin. The respondent's administration of matters such as payroll and financial accountability is highly centralized. As well, there are common classified sections in some papers and a central office to solicit certain types of advertising for all papers. The employees are all subject to the same, detailed corporate policies with respect to benefits and working conditions (including mileage, overtime, educational assistance, vacations, bereavement leave, discipline, life insurance, disability plans, dental care, etc.). The skills of the employees are similar although, of course, the content of each newspaper will reflect events in each community, in accordance with the corporate policy. Indeed, "copy" is shared between newspapers wherever appropriate, that is, when articles would be of interest to the readers of more than one paper. This sharing of copy, reporting assignments and "tips" between reporters at the various papers is not, nor would it be expected to be, extensive given the papers' focus on their respective communities. However, the pooling of resources and copy is not an isolated occurrence and stands in sharp contrast to the corporate policy prohibiting freelance work on a conflict of interest basis to "competitors", defined as businesses which draw revenue from the Metroland market through printing, publishing or distribution. Of considerable importance, as well, is the fact that the promotional route for employees is the organization as a whole rather than simply the individual paper. The managerial personnel of the various community papers, for example, have by and large come up through the ranks at those or other papers within what is now the Metroland chain. The respondent encourages in-house advancement through several vehicles, including, seminars, succession plans and the commonly administered Jackson-Smythe psychological assessment given to each new employee and filed centrally to make central administration aware of employee potential in the various local papers. The evidence revealed a significant number of employee transfers and promotions between the community newspapers within the respondent's organization. It is accurate to note that the various papers are spread across several regional municipalities. However, the disparate geographic locations do not outweigh the already-noted factors of commonality and, moreover, are deceptive in themselves. Firstly, the employees from all the papers do meet at seminars and common social events and are kept "in touch" through the Metrognome, the respondent's in-house publication. Secondly, though, those employees are reporters. That is, their assignments require them to cover various "beats" (e.g. education, police, etc.) where they meet their counterparts from other of the respondent's papers at municipal, regional and even provincial and national events of common interest. Thirdly, it should be noted that many of the papers are not geographically distant from one another and all are clustered within Metropolitan Toronto and its environs, broadly speaking. In the Board's view, of all the evidence on community of interest before the Board, nothing of significance points toward a narrow geographic scope for the bargaining unit definition. In short, the Board is satisfied the unit sought shares a sufficient community of interest that collective bargaining is viable.

21. The Board must next assess whether that broadbargaining unit configuration would cre-

ate labour relations difficulties for the employer. The unit sought is the most comprehensive in light of the respondent's operations and, thus, is most desirable for reasons of administrative efficiency, flexibility, employee mobility and continuation of the corporation's common framework for employment conditions. This is particularly so given that the parties have agreed to a unit of all "editorial" employees. There is already the potential for a number of other units, such as, advertising department employees and circulation department employees. Given the parties' agreement and the traditional pattern of organization in newspapers, the Board is not prepared to reject a unit defined on a "departmental" basis in the present circumstances: see *TV Guide*, *supra*. The Board's long standing aversion to fragmentation, however, reinforces the focus on a unit, in this case, with as broad a geographic base as possible.

22. Employee access to collective bargaining would not be impeded by a finding in this case that the most comprehensive unit was "appropriate". This conclusion is not surprising given that it is the applicant which seeks the larger unit. However, in such circumstances, the Board must be sensitive to the pattern of distribution and level of employee support for the applicant to the extent that, if that support, while numerically sufficient for certification without a vote pursuant to section 7(2) of the Act, is so drastically skewed as to ride roughshod over significant employee groupings, the most comprehensive unit may not be appropriate. In any certification application, support for an applicant may be uneven. Where, however, an unusually broad unit is sought, that is, where the unit would depart from Board practice, the Board must be satisfied that the support is not so skewed as to raise concern that the applicant has tailored its proposed unit to sweep in employee groupings which do not support the applicant and could themselves constitute an appropriate bargaining unit. In *National Trust*, *supra*, the Board was prepared to "group" together in one certificate up to the seven branches for which certification was sought provided that the applicant was certifiable (automatically or following a representation vote) at *each* of the branches to be so combined. The Board in *National Trust* was faced with an apparently irrational and arbitrary request by the applicant for certification in respect of 7 of the 37 branches of that respondent located within a single municipality. In that case, the applicant itself had pointed to the potential for gerrymandering but emphasized that it *had* organized each of the seven branches and, thus, that aspect should not constitute an impediment to certifying the unit sought. The issue in *National Trust*, therefore, was essentially one of bargaining structure and the Board found the grouping of those branches appropriate in the circumstances. In this case, the support for the applicant is substantial across the various locations; there is no concern that the unit sought has been "gerrymandered" by the applicant in any way. The Board is satisfied that the unit sought by the applicant should not be precluded on this basis.

23. The Board has found that there is sufficient community of interest so that the bargaining unit sought is viable and would not thereby occasion labour relations difficulties for the employer. Thus, it is appropriate in this case that the Board's "rough and ready" balancing of policy considerations which has generally crystallized in bargaining units defined with reference to municipal boundaries should give way to the more comprehensive unit sought by the applicant. The Board finds that the geographic scope of the bargaining unit which is appropriate in the instant circumstances is "all editorial employees of the respondent in its Metroland Printing, Publishing and Distributing Division in the Municipality of Metropolitan Toronto, the Regional Municipalities of Halton, Peel, York and Durham and the Township of West Guillimbury".

24. As noted earlier, the parties remain in dispute as to the appropriateness of the part-time/student exclusion in these circumstances and the appropriate managerial exclusions, apart from the parties' concurrence that "publisher" and "editor" (described by different titles) should not be included in the bargaining unit. This matter is referred to the Registrar with respect to the remaining issues.

0701-85-R Ontario Public School Teachers' Federation, Applicant, v. Board of Education for the City of London, Respondent, v. Federation of Women Teachers' Association of Ontario, Intervener

Bargaining Unit - Certification - Collective Agreement - Respondent asserting that occasional teachers already covered by subsisting collective agreement covering Bill 100 teachers - Certain terms and conditions of employment relating to occasional teachers included in personnel manual incorporated into collective agreement - Manual cannot constitute a collective agreement for occasional teachers as a result of voluntary recognition - Certificate issuing

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *R. M. Sloan* and *P. V. Grasso*.

APPEARANCES: *Duncan A. Jewell*, *John D. Stevens* and *Wm. F. Getty* for the applicant; *Peter J. Thorup*, *Peter Gryseels* and *Raymond J. Gladwell* for the respondent; *Elizabeth Lennon* and *Joan Byrne* for the intervener.

DECISION OF THE BOARD; February 11, 1987

1. The Federation of Women Teachers' Association of Ontario is hereby added as a party to these proceedings.

2. This is an application for certification in which the hearing on December 23, 1986, was for the purpose of receiving the representations of the parties with respect to the issue raised by the respondent in its letter dated September 10, 1986, and the applicant's response of September 11, 1986. That is, while the parties had agreed on the bargaining unit definition as "all occasional teachers employed by the respondent in its elementary panel, save and except persons covered by subsisting collective agreements", the respondent had taken the position that there were no employees in the proposed bargaining unit as all *occasional* teachers in the respondent's elementary panel were covered by the subsisting collective agreement in respect of all *teachers* in the respondent's elementary panel. The Board notes that the decision of the Board (differently constituted) dated August 23, 1985, directing a pre-hearing representation vote utilized the phraseology in describing the bargaining unit of "...save and except employees in bargaining units for which any trade union held bargaining rights as of June 20, 1985, being the date of application". The difference in wording does not alter the parties' arguments on the matter.

3. By agreement, the parties proceeded to submissions on the basis that the Board determine the issue from the documentation filed, including the relevant collective agreement and the personnel manual for teachers in the respondent's elementary panel. For clarity, it should be noted that the collective agreement just referred to is between the respondent and those teachers covered by what is colloquially known as "Bill 100". Thus, the term "teachers" refers to "Bill 100 teachers", while those persons who are the subject of this certification application are always referred to as "occasional teachers".

4. The respondent asserted that occasional teachers were already covered by the subsisting collective agreement. That is, certain terms and conditions relating to occasional teachers are found in article 11 of the personnel manual which document is itself incorporated into the collective agreement between the respondent and teachers represented by various "branch affiliates", including the applicant (herein referred to as the "collective agreement"). In particular, counsel noted that alleged violations of the personnel manual are grievable pursuant to article 15 of the collective agreement and article 16 deals with the procedure for revisions to the personnel manual.

Counsel acknowledged that the term “teacher” in the collective agreement and the personnel manual referred to teachers within the statutory definition of the term and, thus, did not include occasional teachers. However, counsel contended that the relevant legislation did not preclude the parties’ agreement to broaden their scope clause. Counsel submitted that the effect of article 11 in the personnel manual directly dealing with occasional teachers and the various references to that document in the collective agreement was tantamount to voluntary recognition that the branch affiliates represented occasional teachers and those occasional teachers were covered by a subsisting collective agreement. In support, counsel referred to *Memorial Hospital, Bowmanville*, [1975] OLRB Rep. Apr. 391. Finally, counsel contended that there could not be provisions in two collective agreements covering the same group of employees and, in the alternative, if the occasional teachers were not found to be represented by the branch affiliates and the applicant certified, the Board should render article 11 of the personnel manual null and void.

5. Counsel for the intervener asserted that the legislation covering teachers’ collective bargaining, Bill 100, did not permit voluntary recognition and, hence, if a trade union had acquired bargaining rights for occasional teachers, those rights must have been acquired pursuant to the *Labour Relations Act* and article 11 of the personnel manual would have to constitute the voluntary recognition document and the complete collective agreement for occasional teachers. In this regard, it was argued that article 11 was defective, at the very least, in that the trade union could not be identified from amongst the three possible branch affiliates, i.e. the intervener (FWTAO), the applicant (OPSTF), and L’Association des Enseignants Franco-Ontariens (AEFO). Further, counsel contended that the Board had no jurisdiction to declare article 11 of the personnel manual null and void because there might be a conflict between provisions of two collective agreements, if the applicant was certified and a collective agreement covering occasional teachers concluded. In the alternative, if the Board possessed such jurisdiction, it was submitted there was no basis to declare article 11 null and void in the instant case.

6. The applicant’s representative submitted that occasional teachers were not covered by the collective agreement between the teachers represented by the branch affiliates and the respondent in respect of the respondent’s elementary panel because the relevant teachers’ legislation did not apply to occasional teachers and the collective agreement was negotiated within that statutory scheme. It was stressed that article 1 of the collective agreement expressly stated the parties were the respondent and teachers employed by the respondent who are *statutory* members of the branch affiliates and this restricted use of the term “teacher” continued throughout the collective agreement. The representative of the applicant concurred with intervener’s counsel that article 11 of the personnel manual could not be regarded as a document conferring voluntary recognition and a collective agreement given the non-conformity of article 11 to a collective agreement within the meaning of the *Labour Relations Act*. The absence in article 11 of a recognition clause and arbitration provision, for example, was noted.

7. It is useful at this juncture to quote the following passage from *The Board of Education for the City of Windsor*, [1986] OLRB Rep. Mar. 378 which sets out the context of certification applications in respect of occasional teachers:

The Legislation Governing Collective Bargaining for “Occasionals” and Regular “Contract” Teachers, and the Special Features of Bill 100

9. It is common ground that the collective bargaining rights of occasional teachers are regulated by the *Labour Relations Act*. They are not “teachers” as defined by the *School Boards and Teachers Collective Negotiations Act* 1975, R.S.O. 1980, c.464 (“Bill 100”), and thus, they are not excluded by section 2(f) of the *Labour Relations Act* [see section 230 of the *Education Act*, R.S.O. 1980, c.129, and section 1(1)(m) of Bill 100]. The result is that, for collective bargaining

purposes, the occasionals fall under the *Labour Relations Act*, while the classroom teachers whom they replace are covered by Bill 100.

10. We do not think that it is necessary to review the various statutes governing the teaching profession or bearing upon a teacher's employment relationship. Such review was undertaken in *York No. 1, supra*, at pp.1285-1296, and need not be repeated here. However it is useful to sketch in some of the background and special features of Bill 100. In *York No. 1* the Board summarized these as follows:

School Boards and Teachers Collective Negotiations Act: "Bill 100".

20. The *School Boards and Teachers Collective Negotiations Act* was enacted in July of 1975. Before its enactment, no special or general legislation regulated collective bargaining between teachers and school boards in Ontario. Collective bargaining did, however, take place between them (see J. Douglas Muir, *Collective bargaining by Canadian Public School Teachers*, Task Force on Labour Relations Study No. 21 (Ottawa: Information Canada, 1968); Bryan M. Downie, *Collective Bargaining and Conflict Resolution in Education: The Evolution of Public Policy in Ontario* (Industrial Relations Centre, Queens University, Kingston, Canada, 1978); and Peter Hennessey, *Schools in Jeopardy: Collective Bargaining in Education*, (McClelland and Stewart, Toronto, 1979)). In October, 1970, the Ontario government established a committee of inquiry whose terms of reference were to inquire into, report upon and make recommendations with respect to the process of negotiation between teachers and school boards, including, *inter alia*, the definition of bargaining units. The committee formally known as The Committee of Inquiry Into Negotiation Procedures Concerning Elementary and Secondary Schools of Ontario was chaired by Judge Reville and will be referred to here as the Reville Committee. It prepared a report dated June, 1972 entitled "Professional Consultation and the Determination of Compensation for Ontario Teachers" in which it reviewed the matters referred to for inquiry and set out its recommendations. The committee's recommendation with respect to bargaining unit scope was that the bargaining agent should represent all employees of a board who hold a teaching certificate, except supervisory officers of the school board. The Ontario Teachers' Federation, which took the position that it should be the statutory bargaining agent for teachers, responded to that recommendation this way:

The Federation feels that the Committee's recommendation is not precise enough. For example, the Federation does not feel a responsibility to negotiate the salary of an employee of a board who holds a teaching certificate which is not a prerequisite under the School Acts and Regulation for employment - for example, a clerical worker with teacher qualifications who works in a school board's office.

The Federation recommends that the members of a teacher negotiating entity shall include those persons coming under the definition of "teacher" in the Teaching Profession Act ...(*Submission to the Minister of Education in Response to the Report of the Committee of Inquiry into Negotiations Procedures*, Ontario Teachers' Federation, June, 1972, p.6.)

Very few of the Reville Committee's recommendations were implemented in Bill 100. The definition of "teacher" ultimately adopted in Bill 100 incorporates all of the elements of the definition of that term in the *Teaching Profession Act* and adds for good measure the stipulation that the employee be employed "as a teacher". Whether that approach achieved precision might now be a matter of debate.

21. The scheme adopted in Bill 100 was that each teacher employed by a board would be represented by an organization called a "branch affiliate" consisting of all the teachers employed by a board who are members of the same "affiliate". (s.1(a)). Each of the five affiliates of the federation is an "affiliate". Paragraph 1(m) defines teacher this way:

(m) "teacher" means a person,

(i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,

(ii) who holds a letter of standing granted by the Minister under the *Education Act*,

(iii) in respect of whom the Minister has granted a letter of permission under the *Education Act*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed by the regulations under the *Education Act*, but does not include a supervisory officer as defined in the *Education Act*, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month;

The Act applies to all “teachers”:

3.-(1) This Act applies to all collective negotiations between boards and teachers in respect of any term or condition of employment put forward by either party for the purpose of making or renewing an agreement.

5. A branch affiliate shall, in negotiations and procedures under this Act, represent all the teachers composing its membership.

It also applies to principals and vice-principals, who are members of the bargaining unit, although they are not permitted to strike:

64.-(1) A principal and a vice-principal shall be members of a branch affiliate.

(2) Notwithstanding subsection (1), in the event of a strike by the members of a branch affiliate each principal and vice-principal who is a member of the branch affiliate shall remain on duty during the strike or any related lock-out or state of lock-out or closing of a school or schools.

The Act contemplates the continued significance of the individual contract of employment between the board and a teacher:

54.-(1) An agreement between a board and a branch affiliate shall be deemed to form part of the contract of employment between the board and each teacher who is a member of the branch affiliate.

(2) Where a conflict appears between a provision of any other part of a contract of employment and a provision of the agreement referred to in subsection (1), the provision of the agreement prevails, but no agreement shall conflict with the form of contract prescribed by the regulations under the *Education Act*.

22. The approach to collective bargaining adopted in Bill 100 differs in a number of respects from the approach of the *Labour Relations Act*. There is no provision for certification of bargaining agents or determination of the appropriate bargaining unit; both the bargaining agent and the scope of the bargaining unit are fixed by Bill 100. The parties are not free to determine the commencement and expiry dates of their collective agreement; under Bill 100, collective agreements must become effective on the 1st day of September and expire only on the 31st day of August in a subsequent year. To be effective, notice to bargain must be given in the month of January in the year in which the agreement expires, considerably earlier than would be the case under the *Labour Relations Act*. Bill 100 provides for fact finding, rather than conciliation, as the third party intervention prerequisite to the resort to the sanctions of strike and lockout. In addition to fact finding, section 63 of Bill 100 prescribes a number of other prerequisites to strike or lock-out activity beyond those found in the *Labour Relations Act*, including a vote on the Board's final offer and a strike vote, with both votes conducted under the supervision of the Education Relations Commission, as well as at least five days' written notice to the board of the date on which the

strike will commence. Like the *Labour Relations Act*, Bill 100 imposes on each of the parties to collective bargaining the obligation to bargain in good faith and make every reasonable effort to make or renew an agreement. Jurisdiction to assess and enforce compliance with this obligation is assigned to the Education Relations Commission, which is also assigned a number of other duties which have no equivalent in the jurisdiction assigned to the Ontario Labour Relations Board under the *Labour Relations Act*. Bill 100 assigns to the Ontario Labour Relations Board jurisdiction over applications for a consent to prosecute alleged contraventions of the Act (subsection 77(6)), and applications for declarations and directions with respect to allegedly unlawful strikes and lockouts (section 67).

...

12. Bill 100 provided a new statutory framework for an already well-established but voluntary collective bargaining system, and it had many interesting features - as the Board noted in *York No. 1*. One of them is that principals share most of the collective bargaining rights of their professional colleagues. They are not only members of the same bargaining unit and bargaining agent as other teachers but the legislation *requires* that this be so. But what is also interesting for this case (and not stressed in *York No. 1*) is the extent to which the Legislature gave its imprimatur to a system in which the teacher collective bargaining organizations continue to be defined and divided on the basis of religion, language, or gender. The affiliates (*inter alia* statutory collective bargaining agencies) defined by Bill 100 are: The Ontario Secondary School Teachers' Federation (OSSTF), The Ontario Public School Men Teachers' Federation (now OPS), The Ontario *English Catholic* Teachers' Association (OECTA), The Federation of *Women* Teachers' Association of Ontario (FWTAO), and L'Association des Enseignants *Franco-Ontariens* (AEFO). Under Bill 100 a male elementary school teacher is (and must) for collective bargaining purposes be represented by OPS. A female is (and must) be represented by FWTAO. A Francophone is represented by AEFO. A Catholic Anglophone is represented by OECTA.

...

16. It is not clear why occasionals were omitted from Bill 100. There is no indication that the Legislature has ever turned its mind to their situation. Perhaps it is simply that occasionals were not part of the pre-1975 bargaining process and had not indicated any appetite for collective bargaining. But that has certainly changed. The Board has dealt with or currently has before it, certification applications involving literally hundreds of occasional teachers seeking representation by the statutory collective bargaining agents which represent their teacher counterparts covered by Bill 100. One of those cases involves the respondent's secondary school supply teachers and an application by OSSTF - see Board File 3042-84-R. The question in this case is whether elementary school teachers employed by the respondent can be represented by OPS.

8. With this background, the Board turns to the respondent's assertion that the occasional teachers were already covered by a subsisting collective agreement, namely, article 11 of the personnel manual, as a result of voluntary recognition. The Board does not agree with this proposition. It is clear that the collective agreement between the respondent and the teachers represented by the branch affiliates is solely concerned with teachers who are statutory members of the various branch affiliates. Indeed, the respondent acknowledged that the term "teacher" used throughout the collective agreement and the personnel manual did not include "occasional teachers". That the collective agreement incorporates another document, in this case, the personnel manual, as a source of further terms and conditions of employment is not unusual. What the respondent is seeking, however, is a reaching into the collective agreement "proper", as it were, to supplement article 11 in the personnel manual, the sole provision dealing with occasional teachers, to flesh out a document which could be regarded as a collective agreement in respect of those *occasionals*. In the Board's view, this torturous process strains the collective agreement and the personnel manual beyond any reasonable interpretation.

9. Moreover, it is evident from the legislative background referred to in the passage cited

that the parties (and the legislature) did not intend the collective agreements covering "teachers" to extend to occasionals. As occasional teachers fall under the *Labour Relations Act*, it is possible for a bargaining agent to be granted voluntary recognition on their behalf. However, that requires that recognition be granted by an employer to an identifiable bargaining agent at a specific point in time because the *Labour Relations Act* attaches important rights to the various parties involved, including employees. In this case, those elements of specificity are absent. On the face of article 11 of the personnel manual, even in the context of the entire collective agreement, one cannot identify the "trade union" which has been accorded voluntary recognition in respect of occasional teachers. The three branch affiliates (FWTAO, OPSTF and AEFO) are separate bodies and cannot be regarded as a "council of trade unions" within the meaning of section 1(1)(g) of the Act. Article 1 of the collective agreement which sets out the parties to that agreement is written in terms which expressly excludes occasional teachers. In short, the documents cannot constitute a collective agreement for occasional teachers as a result of voluntary recognition. To hold otherwise would result in a situation wherein the branch affiliates collectively acquired rights at some undetermined time in the past to represent various groups of occasional teachers through voluntary recognition granted by the employer without any of the parties being aware that voluntary recognition had been granted or a collective agreement negotiated. Further, this would cause fragmentation of the occasional teachers amongst the three branch affiliates, a result which would not be sanctioned by the Board in a certification application concerning occasionals: *The Board of Education for the City of Windsor, supra*, and the cases cited therein; *Windsor Roman Catholic Separate School Board*, [1986] OLRB Rep. July 1028. Such an outcome does not make sense in historical or labour relations terms. Finally, it must be noted that the Board makes no comment, as the matter was not raised nor is a finding necessary in this case, as to the trade union status within the meaning of the *Labour Relations Act*, of the branch affiliates, except as may have already been determined by the Board in other cases.

10. Thus, the Board finds that the occasional teachers were not in bargaining units for which any trade union held bargaining rights at the date of application for certification and, therefore, fall within the bargaining unit otherwise agreed to by the parties.

11. The results of the pre-hearing representation vote were that 164 ballots of the 189 cast were cast in favour of the applicant. Other than the respondent's argument just dealt with, there were no objections. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 70 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of August 23, 1986.

12. Accordingly, the applicant is entitled to certification in respect of the following bargaining unit, which the Board finds to be appropriate:

all occasional teachers employed by the respondent in its elementary panel, save and except persons in bargaining units for which any trade union held bargaining rights as of June 20, 1985, being the date of application.

13. The respondent asked the Board, in the alternative, to declare article 11 of the personnel manual null and void. Even assuming the Board has the jurisdiction to do so, the Board sees no basis for such a declaration in the instant case on the ground that there is a potential for conflict between an existing collective agreement and a collective agreement which has yet to be negotiated.

14. A formal certificate shall issue to the applicant.

2390-86-R The London Soap Company Limited, Applicant, v. London and District Service Workers' Union, Local 220, Respondent, v. Group of Employees, Intervener

Reconsideration - Termination - Employer applying for termination and requesting that Board direct a representation vote because a substantial number of the employees in the unit have indicated they no longer wish to be represented by the respondent - Employees supporting application - Wishes of employees cannot trigger a representation issue under s.59 - S.59 application dismissed - Not appropriate for Board to reconsider its decision to certify the respondent - Application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Morton Adelson* for the applicant; *R. Jacques* for the respondent; *Cindy Collins* and *Lee Woods* for the intervener.

DECISION OF THE BOARD; February 23, 1987

1. This application made pursuant to section 59 of the *Labour Relations Act* by the London Soap Company Limited on behalf of itself and (some) bargaining unit employees for a declaration that the respondent London and District Service Workers' Union, Local 220 no longer represents the bargaining unit employees of that company for which it holds bargaining rights came on for hearing in Toronto on January 19, 1987. The respondent opposed the application. After hearing the "best case" representations of fact and law of the applicant and the group of employees who sought, at the hearing, to intervene in support of the application, the Board dismissed the application. The Board's reasons follow.

2. The employer's application asserts, in paragraph 5 that:

5. There is no contract and 13 of 19 employees have indicated their desire that they do not wish to be represented by the union, and copies of their notations are attached hereto.

They represent 70% of the employees of the Union.

Enclosed with the application were 13 separate handwritten statements made by persons said to be bargaining unit employees and indicating on their face that they do not want the respondent or any union representing them at The London Soap Company Limited.

3. The respondent trade union filed a reply which states, in Appendix "A", as follows:

- (1) On August 1, 1986 the parties attended at the Labour Relations Board whereby the parties agreed to waive their rights to a formal hearing (see Board File Number 1198-86-R and Board decision dated August 6, 1986).
- (2) Notice to bargain pursuant to section 14 was given on or about August 1, 1986.
- (3) The parties met in negotiations in London on August 27, 1986, October 14, 1986, and on November 5, 1986.
- (4) An agreement was reached on November 5, 1986 whereby the parties would recommend acceptance to their respective principals.

- (5) On November 20, 1986 the Union membership rejected the proposed agreement at a ratification vote.
- (6) On December 1, 1986, Roy Jacques spoke to Peter Soumalias (Owner) about resuming negotiations and discussed wages for the "packers". Mr. Soumalias said he would consider this.
- (7) On December 11, 1986 Mr. Jacques called Mr. Soumalias and was informed that the Employer did wish to resume negotiations.
- (8) On December 11, 1986 the Union applied for conciliation.
- (9) On December 31, 1986, the Union received correspondence from the Ministry of Labour dated December 22, 1986 advising the Union that a Conciliation Officer has been appointed (see File No. 86-2252)

4. It was not disputed that the facts alleged by the respondent in its Reply are substantially correct. However, counsel for the applicant employer asked the Board to direct a representation vote of the bargaining unit employees to determine whether or not the respondent's bargaining rights with respect thereto should be terminated. He submitted that the Board should do so pursuant to either section 59 or its powers under section 106(1) of the Act because a substantial number of the employees in the bargaining unit have indicated that they no longer wish to be represented by the respondent, a situation which, according to counsel and to Mr. Soumalias, has made it impossible for the trade union to properly represent the employees or for the company to bargain with the respondent. Counsel cited *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639 and *R v. Ontario Labour Relations Board, Ex. p. Genaire Ltd.*, [1958] O. R. 637, 14 D.L.R. (2d) 201 sub. nom. *Genaire Ltd. vb. International Association of Machinists et al* (Ont. H.C.); affirmed at (1959), 18 D.L.R.(2d) 588 (Ont. C.A.), in support of his position. The group of employees supported the application. They complained about the manner in which the respondent has served and represented them and asserted that they no longer desire to be represented by the union. It was also asserted that there has been a substantial turnover in employees in the bargaining unit since the respondent was certified and that this constitutes a material change in circumstances that should cause the Board to direct that a representation vote be held.

5. We note that in *Addidas Textile (Canada) Ltd.*, *supra*, the respondent in an application for certification sought reconsideration of the Board's decision to certify the applicant on the basis that the membership evidence relied upon by the trade union was obtained through the support of management personnel, contrary to the Act. There, the Board was concerned that the circumstances, including the involvement of the management personnel in the trade union's organizing campaign, cast some doubt on the applicant trade union's membership evidence as being a true expression of the wishes of the employees. Accordingly, the Board revoked the certificate it had granted and exercised its discretion under section 7(2) of the Act to direct the taking of a representation vote. There is no suggestion in this proceeding that there was any improper management involvement with the respondent trade union. Further, the events that caused the Board to decide as it did in the *Addidas* case occurred prior to the matter coming before the Board. Consequently, that decision was of no assistance to the Board in this proceeding.

6. Section 59 of the Act provides as follows:

- (1) If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

7. Unlike sections 57 and 60, section 59 does not provide a means by which the wishes of the bargaining unit employees can be used to trigger a representation issue. It has long been recognized that the purpose of section 59 is to protect the employer and the employees from a trade union that fails to exercise its right to bargain on behalf of the bargaining unit it represents (see for example, *Prescott Machine of Welding Inc.*, [1983] OLRB Rep. Feb. 250 and the line of cases beginning with *Dominion Stores Ltd.*, 56 CLLC ¶18,047). Section 59 is not a mechanism for monitoring the support enjoyed by a trade union.

8. The allegations of the respondent trade union, which the parties accepted as being accurate, made it abundantly clear that the trade union has not failed to bargain on behalf of the employees it represents. Accordingly, there was no basis on which the respondent's bargaining rights could be terminated pursuant to section 59 of the Act.

9. Though we doubted that the request for reconsideration was properly before us, we did consider the argument that the Board should make use of its powers under section 106(1) of the Act to reach the result sought by the employer and group of employees. Section 106(1) provides that:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The Board is an administrative tribunal established by the legislature of this Province to regulate labour relations by administering the *Labour Relations Act*. In doing so, the Board applies both legal principles and labour relations considerations. Although the Board is a statutory body which has only those powers conferred upon it by or under the Act, the structure of the Act is such that the Board nevertheless enjoys a considerable discretion in exercising its powers. (see *Re International Union of Operating Engineers Local 793 and Trauggott Construction Ltd.*, (1984), 45 O.R. (2d) 127 Div. Ct.; *Re Shopman's Local Union No. 743, International Association of Bridge, Structural and Ornamental Ironworkers AFL, CIO, CLC*) and *Brayshaws Steel Ltd. et al.*, *Re Brayshaws Steel Ltd. and United Steelworkers of America*, (1972) 26 D.L.R. (3d) 153 (Ontario Court of Appeal)).

10. In *Genaire Ltd.*, *supra* McRuer, CJHC, upon application by the employer for an order in the nature of certiorari with mandamus in aid, held that the Board erred in refusing to entertain the company's application for a declaration terminating the trade union's bargaining rights made on the basis that a majority of the employees in the bargaining unit no longer support the union. McRuer CJHC held that the Board's power to reconsider its previous decisions, pursuant to what is now section 106(1) of the Act, was sufficient to permit the Board to entertain the employer's application and accordingly the Board's decision was quashed and the matter was remitted to the Board. The Board (in a decision reported at 59 CLLC ¶18,140) then held that the employer had failed to establish that a majority of bargaining unit employees no longer wished to be represented by the trade union and dismissed the application on that basis. The Board specifically stated that it

found it unnecessary to decide whether or not, in exercising its powers for reconsideration, it should distinguish between circumstances that occurred before and those that occurred subsequent to the date of the initial hearing.

11. The Board's jurisdiction to reconsider a decision is a broad one. However, both the Act and the realities of labour relations dictate that the premise from which the Board begins is that its decisions should be final and conclusive for all purposes. Practice Note No. 17 accurately sets out the circumstances under which the Board will reconsider a decision. In recognition of the need for finality, the Board will not usually reconsider a decision unless an obvious error has been made; or the request raises important issues of Board policy; or, it is satisfied that the party requesting it proposes to adduce new evidence that it could not, with the exercise of due diligence, have obtained previously, and that the new evidence, if adduced, would be virtually conclusive; or, if a party wishes to make representations or objections it had no previous opportunity to raise. The Board has entertained applications for reconsideration alleging that events that occurred subsequent to (as opposed to having occurred prior to but only discovered subsequent to) the hearing of a matter had so altered the situation that a remedial order made by the Board was clearly inappropriate (see for example *The Journal Publishing Co. of Ottawa Ltd.* [1977] OLRB Rep. Sept. 549 and Nov. 748; *Culverhouse Foods Ltd.* [1978] OLRB Rep. March 219). However, it does not appear that the Board has ever reconsidered a previous finding of fact or, other than in *Genaire Ltd.*, *supra*, its disposition of an application for certification on the basis of events that occurred subsequent to the hearing of the matter. Notwithstanding *Genaire Ltd.*, *supra*, it is difficult to imagine any situation where it would be appropriate for the Board to reconsider such findings or dispositions, as opposed to remedial orders, on the basis of subsequent events (even in *Atlantic Packaging Products Ltd.* [1980] OLRB Rep. Feb. 158 the Board reconsidered its decision to certify a trade union not because of the build-up in the employer's workforce that occurred subsequently, but because the parties knew, on the date of application, that the build-up was planned and imminent and because, had that planned build-up been brought to the Board's attention, a certificate would not have been issued). The fluid nature of labour relations is such that changes in circumstances are common. A less stringent approach to reconsideration would result in a lack of finality and certainty that would have a destabilizing effect on the labour relations of this province. This is particularly true of Board decisions, such as that which the employer (and the group of employees) asked the Board to reconsider in this application, which certify a trade union as the bargaining agent for a group of employees.

12. The certification process and the manner in which the Board ascertains the wishes of the employees concerned has been described by the Board in a number of previous decisions (see for example *Unlimited Textures Company Limited* [1984] OLRB Rep. Jan. 138 at paras 15-17 and *Famz Foods Limited* [1985] OLRB Rep. June 857 at paras 10-14). In an application for certification, the Board must, pursuant to section 7(1) of the Act, ascertain the number of employees in the bargaining unit at the time the application was made and the number of those employees who were members of the applicant trade union on the date assessment date established, under section 103(2)(j) of the Act, to be the time for ascertaining membership under section 7(1) of the Act. The Board's determinations with respect to the membership support enjoyed by the trade union are made on the basis of the circumstances that exist on the assessment date, prior to the hearing. Once the Board has made these determinations, subsections 7(2) and 7(3) govern the manner in which the Board determines whether or not the trade union is to be certified. Thereafter, the Act, subject only to sections 58 and 59, guarantees a newly certified bargaining agent a period of stability by giving it a minimum of twelve months to achieve a collective agreement with the employer free of any risk of being displaced as the bargaining agent. That this is so is abundantly clear from the manner in which the provisions of the Act relating to certification and to the termination of bargaining rights are structured. Consequently, the need for finality in decisions where the Board

certifies a trade union, particularly where, as here, the parties have, by bargaining collectively, acted and relied on the decision, is dictated not only by the nature of bargaining in a first collective agreement situation, but also by the provisions of the Act. There is no room for any reassessment of the support enjoyed by a certified bargaining agent except as specified in the Act and it is not appropriate for the Board to entertain a termination application made in the guise of a request for reconsideration. Consequently, and quite apart from the question of the propriety of the applicant employer's purporting to speak on behalf of employees for whom the respondent is the exclusive bargaining agent, it would not, in our view, be appropriate for the Board to reconsider its decision to certify the respondent herein even if the facts asserted by the employer and the group of employees were established to the Board's satisfaction. Those circumstances are more appropriately brought before the Board by way of a new proceeding commenced within the framework and time limits, if any, specified by the Act. Accordingly, assuming that it was properly before us, the request for reconsideration was dismissed.

13. For all of the foregoing reasons this application was dismissed. The London and District and Service Workers' Union, Local 220 continues to be the exclusive bargaining agent for the employees in the bargaining unit for which it has been certified until such time as the Board declares otherwise. In addition, the London Soap Company Limited remains obliged to bargain with the union in good faith to make every reasonable effort to make a collective agreement.

2543-86-R United Plant Guard Workers of America, Local 1962, Applicant, v. National Protective Service Company Limited, Respondent

Certification - Constitutional Law - Respondent providing security guard services to Federal Government - Board concluding that constitutional jurisdiction over labour relations for these security guard services fall within federal jurisdiction - Tasks performed necessarily incidental to federal operations - Certification application dismissed

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

APPEARANCES: *Ian Roland* and *Watson Cook* for the applicant; *Walter T. Langley* and *Gordon Shearly* for the respondent.

DECISION OF THE BOARD; February 4, 1987

1. The name of the respondent is amended to "National Protective Service Company Limited."
2. This is an application for certification in which the applicant seeks to be certified as the bargaining agent for security guards employed by the respondent.
3. In its reply to the application, and in its submissions before the Board at the hearing of this matter on January 9, 1987, the respondent challenged the jurisdiction of the Board to deal with the application, on the basis that the activities of the respondent fall within federal jurisdiction.

4. The respondent is in the business of providing security guard services in the Regional Municipality of Ottawa-Carleton, and in Hull, Quebec. It was incorporated in Ontario and is licensed under the *Private Investigators and Security Guards Act*, R.S.O. 1980, c. 390, as well as under similar legislation in the Province of Quebec. As of December 10, 1986, the date of this application, the respondent had a total of approximately 230 persons on its payroll, 190 of whom were security guards employed on a full-time basis, and 29 of whom were security guards employed on a part-time basis.

5. During November of 1986, the respondent provided a total of 34,587 hours of security guard services in the Regional Municipality of Ottawa-Carleton. About 92% of those hours were provided to various departments and agencies of the Federal Government, including Revenue Canada, Transport Canada, Public Works Canada, Health and Welfare Canada, Parks Canada, C.M.H.C., C.B.C., the National Energy Board, the Atomic Energy Control Board, and the National Capital Commission. The remaining 8% of those hours were provided to other clients, such as the City of Ottawa, the Regional Municipality of Ottawa-Carleton, the Ottawa Public Library, Ashbury College, Ellis-Don, an art fair, a car dealership, and a convenience store. Gordon Shearly, the respondent's President and Chief Executive Officer, was the sole witness called to testify at the hearing of this matter. He told the Board that the number of hours of security guard services provided by the respondent to clients other than the Federal Government in December of 1986 was slightly higher than the respondent's average monthly total for such clients. He also testified that although the number of hours worked at specific locations varies somewhat from month to month, the percentage breakdown between Federal Government work and work for other clients remains fairly stable. In this regard it was his uncontradicted evidence that during the eighteen-month period prior to this application, security guard services provided to departments and agencies of the Federal Government consistently constituted between 90 and 95 percent of the respondent's work. Prior to that, it consistently amounted to at least 80 percent of the respondent's work throughout the nine-year period during which Mr. Shearly has been the owner of the respondent. There is no regular rotation of security guards from location to location. However, security guards who work at Federal Government sites are occasionally offered opportunities to work overtime at non-governmental locations. Conversely, security guards who generally work at sites operated by clients other than the Federal Government are occasionally assigned to work at Federal Government sites when the need arises.

6. With the exception of pre-board passenger screening services provided to the Department of National Defence at its Canadian Forces Base in Ottawa, all of the respondent's security guard services at Federal Government sites in Ottawa-Carleton were provided pursuant to a detailed, written standing offer agreement for the provision of security guard services at departments and agencies of the Federal Government. That agreement consists of an 83 page contract in a form prepared by Supply and Services Canada. Most of the Federal Government sites at which the respondent provides security guard services are owned by the Federal Government; the remainder are leased by it. Space at a few of the locations at which the respondent provides security guard services to Public Works Canada is leased by the Federal Government to private tenants. A few of the other locations include both Federal Government offices and offices of other entities.

7. The respondent also provides security guard services, involving between 30 and 35 security guards, to Public Works Canada at Place du Portage, a Federal Government complex in Hull, Quebec. That arrangement has been in place for about eight years. All of the respondent's security guards who work in Quebec are also licensed to work in Ontario, and some of them are called upon by the respondent to do so from time to time. Conversely, some of the respondent's security guards who work primarily in Ontario are also licensed (by the Government of Quebec) to work in

Quebec, and are called upon by the respondent to do so from time to time in order to fill temporary vacancies or replace employees absent due to illness. The respondent has an office address in Quebec, as required by Quebec law, but that office is not actually occupied by the respondent, which manages all of its operations from its office in Ottawa.

8. During November of 1986, the respondent provided about 2,000 hours of pre-board passenger screening security services to the Department of National Defence at its Canadian Forces Base in Ottawa, pursuant to a separate contract between Supply and Services Canada and the respondent. Those services were performed by approximately a dozen specially trained security guards.

9. Security guards sent by the respondent to Federal Government sites generally report to local security officers employed by the Federal Government at those sites. The Federal Government has a quality assurance cell which monitors the quality of security guard services provided to it by the respondent (and by other companies). The Federal Government administers a formal examination to all employees whom the respondent proposes to use as security guards pursuant to the standing offer agreement or the aforementioned contract respecting security services at the Canadian Forces Base in Ottawa. The standing offer agreement also requires the respondent to provide an in-house formal classroom training programme for security personnel to be assigned to guard Federal Government sites. A detailed description of that programme occupies ten pages of the standing offer agreement. The security services contract respecting the Canadian Forces Base in Ottawa includes similar provisions. Those documents also specify a number of conditions which constitute "cause for immediate removal" of security guards by the Federal Government from work assignments on its premises. It was Mr. Shearly's evidence that the respondent's standing offer agreement with the Federal Government is "much more demanding" than the respondent's contracts with other clients. The same is true of the contract respecting security services at the Canadian Forces Base in Ottawa.

10. Security guards employed by the respondent provide a variety of services at Federal Government sites, including enforcing fire safety standards; administering emergency first aid; searching for, identifying, and reporting suspect items during bomb threat situations; acting as traffic emergency officers during fire/bomb threat incident evacuations; carrying out phased evacuations; arresting persons found committing any criminal offences, and restraining such persons from causing further injury or damage; operating elevators; performing control room operation duties during normal periods and during emergency situations; providing surveillance of cleaning staff; ensuring that only authorized articles are removed from Federal Government buildings; controlling the movement of people, material, and vehicles; guarding sensitive areas such as taxation buildings, restricted areas, and high profile areas (such as senior departmental officials' offices); maintaining security communications; acting as members of fire emergency squads; assisting mobility impaired persons; maintaining effective public relations; and complying with "post orders" prepared by the Federal Government in respect of guard duties to be performed at particular Federal Government sites. As indicated by Mr. Shearly in his testimony before the Board "some [of those duties] only occur in case of emergency, but when they are required, it's terribly important that they be performed properly."

11. There is no real dispute between the parties concerning the legal principles which are to be applied in resolving the jurisdictional issue raised by the respondent in these proceedings. The regulation of contracts of employment, hours of work, minimum wages, and other aspects of employment law, including labour relations, is generally a matter of "Property and Civil Rights in the Province", within the meaning of section 92(13) of the *Constitution Act* and, accordingly, is generally within the jurisdiction of the provincial legislatures (see *Toronto Electric Commission v.*

Snider, [1925] 2 D.L.R. 5 (J.C.P.C.); *Re Northern Electric Company Limited*, 63 CLLC ¶15,484; and *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272; application for judicial review dismissed in *Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688 et al.* (1981), 30 O.R. (2d) 732 (Div. Ct.); leave to appeal denied, September 15, 1980. However, there is also a sphere of federal labour law jurisdiction in respect of employees of employers who are engaged in enterprises that are within federal jurisdiction, such as those set forth in section 91 and in parts (a), (b), and (c) of section 92(10) of the *Constitution Act*. Accordingly, Parliament has enacted legislation that governs labour relations in federal areas of activity. Section 108 of the *Canada Labour Code*, R.S.O. 1970, c.L-1, as am., provides:

This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

In *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1 (S.C.C.), at page 13, Dickson J. (as he then was) wrote, in part, as follows in delivering the unanimous judgment of the Court:

The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law*, 4th ed. (1975), p. 363:

In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise...

In an elaboration of the foregoing, Mr. Justice Beetz in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1, set out certain principles which I venture to summarize:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a 'going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

See also *Windsor Airline Limousine Services Limited*, *supra*, at paragraph 25, in which the Board stated:

Regulatory control of labour relations on a federal level can be exerted only in respect of activities which fall within federal authority by specific reference, (see *Eastern Canada Stevedoring Limited* [1955] S.C.R. 529; [1955] 3 D.L.R. 721), by reference to the federal general or residuary power (see *Pronto Uranium Mines Ltd. and Algoma Uranium Mines Limited v. Ontario Labour Relations Board*, [1956] O.R. 862; 5 D.L.R. (2d) 341), by the exercise of federal authority by a declaration under section 92(10)(c) of the B.N.A. Act, or by direct relation to federal government operations and federal Crown enterprises, (see *Reference re Legislative Jurisdiction Over Hours of Labour*, [1925] S.C.R. 505; [1925] 3 D.L.R. 1114).

12. The approach which has generally been adopted by the Courts (and by labour relations boards) in determining constitutional issues such as those raised in the present case was aptly summarized by Paul C. Weiler, as Chairman of the British Columbia Labour Relations Board, in *Arrow Transfer Company Ltd.*, 74 CLLC ¶16,130, at 1079-1080:

They [the Courts] begin with the operation which is at the core of the federal undertaking (e.g. railway, shipping, or the postal service). They then look at the particular subsidiary operation engaged in by the employees whose collective bargaining is in question and reach a judgment about the relationship of that operation to the basic federal undertaking. The judges have used a variety of terms to characterize the part the particular operation may play in the over-all enterprise. It must have a 'vital', 'essential', 'integral', 'important', or 'intimate' role in the undertaking if it is to fall within the jurisdiction of Parliament. As was said earlier, that has been the conclusion about the relationship of stevedoring to shipping and of mail pick-up to the postal service; the opposite conclusion was reached regarding the relationship of a hotel to the railroad. In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure of the employment relationship.

In the *Northern Telecom* case, *supra*, at page 14, the Supreme Court of Canada described that passage as "a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters". See also *Toronto Auto Parks (Airport) Limited*, [1978] OLRB Rep. July 682, in which the Board found to be within provincial jurisdiction the labour relations of an employer which operated public parking facilities owned by the Federal Government at Toronto International Airport. That employer's employees were responsible for operating public parking facilities at the airport, collecting parking fees from users of those facilities, keeping the parking areas and cashier booths clean, and retrieving baggage carts from where they were left by airline passengers in order to reposition them where they would be more readily available to the travelling public. In finding that it had jurisdiction in that case, the Board concluded that although the services provided "a convenience to the travelling public", they were not "sufficiently integral to aeronautics to bring them within federal legislative jurisdiction."

13. What is in dispute in these proceedings is the result which the application of those principles yields in the context of the present case. Counsel for the respondent submitted that all of the aforementioned security guard services provided by the respondent to the Federal Government are integral or necessarily incidental to Federal Government works and undertakings. Counsel for the applicant, on the other hand, contended that those services are not an integral or essential part of Federal Government operations. He acknowledged that any tenant needs security services, as such services are essential to the operation of a building. However, he argued that such services are not essential or integral to any of the heads of federal jurisdiction under sections 91 and 92(10) of the *Constitution Act*.

14. In an unreported decision dated June 2, 1982 (in C.L.R.B. File No. 555-1757), the Canada Labour Relations Board found that it had constitutional jurisdiction over security employees

of Burns International Security Services Limited working at the Gander International Airport in Gander, Newfoundland, and certified the International Association of Machinists and Aerospace Workers as their bargaining agent. We respectfully agree with that conclusion, and find the same to be true of the respondent's employees who provide pre-board passenger screening security services for the Department of National Defence at its Canada Forces Base in Ottawa. In this age of "sky-jacking" and terrorist activities involving airplanes, their crews, and their passengers, it cannot legitimately be said that pre-board passenger screening security services are a mere convenience. To the contrary, they clearly have a vital, essential, integral, important, and intimate role in aeronautics, which is a well established area of federal jurisdiction. This reasoning applies with even greater vigour to military aeronautical operations, such as those carried on at the Canadian Forces Base in Ottawa, in view of the federal power over "Militia, Military and Naval Service, and Defence", under section 91(7) of the *Constitution Act*.

15. Having regard to all of the evidence and the submissions of the parties, we have also concluded that constitutional jurisdiction over labour relations between employers and employees who provide security guard services of the type described above on a regular and ongoing basis to departments and agencies of the Federal Government also fall within the ambit of federal jurisdiction. The tasks performed for Federal Government departments and agencies by the respondent's employees, such as the evacuation of buildings in fire/bomb threat situations, the arrest of persons committing criminal offences, the guarding of sensitive areas such as taxation buildings, restricted areas, and high profile areas (such as senior departmental officials' offices), and the operation of control rooms in normal and emergency situations, play a vital, essential, integral, important, and intimate role in the operation of those departments and agencies, and are necessarily incidental to such operations, which fall within various heads of federal power under section 91 of the *Constitution Act*, such as "The Public Debt and Property", under section 91(1A); "The raising of Money by any Mode or System of Taxation", under section 91(3); and the Federal Government's "Peace, Order, and Good Government" general or residuary power.

16. Counsel for the applicant did not request that the Board issue a certificate confined to those security guards in the employ of the respondent who are generally, although not invariably, used by the respondent to provide security guard services for clients other than Federal Government departments and agencies, nor did he suggest that the Board would have jurisdiction to do so in the circumstances of this case, in which, as noted above, less than ten percent of the respondent's employees fall into that category. Accordingly, it is unnecessary to decide that matter in this decision.

17. For the foregoing reasons, this application is hereby dismissed.

0133-86-OH Marie V. Roy, Complainant, v. North American Plastics Company Limited, Peter Walker, Michael N. Brown, Steven Lemak, and Lad Kaminsky, Respondents

Health and Safety - Employee sent home from work and later suspended following work refusal - Employee refusing to meet with member of health and safety committee and to state reason why she considered work to be unsafe - Employee's conduct resulting in employee herself breaching the Act - Employee had a real personal concern about the safety of working the automotive parts line - Failure to assign employee to reasonable alternative work contrary to Act - Suspension reduced

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *F. W. Murray* and *D. A. Patterson*.

APPEARANCES: *Marie Roy* and *Barbara Starr* for the complainant; *Michael N. Brown* and *Steven Lemak* for the respondents.

DECISION OF THE BOARD; January 30, 1987

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*. The hearings into the complaint took seven days to complete. The respondent employer, which bears the onus of proof, called nine witnesses. The complainant then called 13 additional witnesses, including herself. Below we have set out in summary form our understanding of most of the events referred to by the witnesses. Detailed discussion of the evidence has been limited to those matters which are both relevant to the complaint and with respect to which the evidence is in conflict.

2. Section 24 of the Act provides, in part, as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

• • •

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

• • •

3. The respondent company is an automotive parts manufacturer located in Wallaceburg. Its plant employees are represented by the International Union United Automobile, Aerospace and Agricultural Implement Workers of America, Local 251 ("the union"). There are approximately 650 employees in the bargaining unit represented by the union, including the complainant. The company has a history of health and safety problems, including work refusals by persons other than the complainant. The complainant made repeated references to these problems throughout the hearing. Company representatives readily acknowledged the problems. Mr. Michael Brown,

the respondent's personnel manager, testified that the company has been seeking to improve matters, and in this regard has sought the assistance of the Ministry of Labour's Industrial Health and Safety Branch. It is of interest that the instant complaint involves foreman Steven Lemak. The evidence establishes that Mr. Lemak's area of responsibility has experienced the least amount of lost time by employees, the least number of employees requiring first aid treatment, and, apart from the complainant, no work refusals by employees and no complaints by employees relating to safety matters. The complainant testified that prior to the events described below, she never encountered any difficulties with Mr. Lemak. Indeed, she commented that he was the respondent's kindest and best supervisor. In making her final submissions, the complainant contended that Mr. Lemak's conduct of which she complains must have been the result of Mr. Brown saying something to Mr. Lemak to "twist his brain about".

4. The complainant is 28 years of age. She is highly articulate. Management witnesses readily acknowledged that when at work the complainant is a good worker. The complainant's employment relationship with the respondent has been quite eventful. She initially commenced working for the respondent in 1984. While still a probationary employee, she was discharged. The company contended that her discharge was due only to the fact that during her probationary period she had been absent a majority of her scheduled work days. The complainant, however, contended that her discharge had been due to her refusal to perform a job in the decorating department which she believed to be unsafe. The complainant filed a complaint alleging that her discharge was in violation of section 24 of the Act. The parties settled the complaint in February 1985 with the complainant being returned to work without any compensation. In these proceedings the complainant alleged that since her reinstatement she has been constantly harassed by management in retribution for her having filed her complaint. Apart from the events described below, however, no evidence was led which might arguably support such a claim. The complainant did complain to Mr. Rick Lalonde, the union's plant chairperson, about alleged harassment on the company's part. Mr. Lalonde testified that no grievance was filed with respect to the allegation since the union had no facts to back it up.

5. At some point in 1985 the complainant indicated to Mr. Lemak that she was receiving static shocks when working on the respondent's Chrysler line. It was the grievor's testimony that because of the shocks, she refused to work. Mr. Lemak, however, testified that he did not recall the grievor refusing to work. According to Mr. Lemak, after the complainant raised the matter of the shocks with him, he had two maintenance employees and two electricians investigate the matter and they found nothing wrong. Notwithstanding this finding, it appears that the complainant was assigned to other work.

6. Four employees, including two called as witnesses by the complainant, testified that they had never received shocks from the Chrysler line. Three other employees, however, namely Mr. Kevin Hooper, Miss Diane MacAdam and Mrs. Sandy McFadden, testified that they had, at times, received shocks from the line. Mr. Hooper described the shocks as "small, nothing major". Mrs. MacAdam stated that sometimes she would get the shocks every day for 3 or 4 days and then not get them for a while. The three employees testified that they had never reported receiving shocks to management or the union. Both Mr. Lemak and Mr. Lalonde testified that apart from the complainant they had not received any complaints from employees about receiving shocks.

7. In response to a question from Board Member Patterson, the complainant indicated that every time she touched a part on the Chrysler line, she received a shock, and that she touched the line approximately every half minute. The complainant further testified that when she was on the Chrysler line, any person near her would receive shocks off of her. Although the complainant called 12 witnesses in addition to herself, none of them testified to receiving shocks off of her. On

March 19, 1986 Mr. Mortensen, a health and safety inspector, inspected the Chrysler line for shocks. Mr. Mortensen asked the complainant to touch a number of panels on the line, while he was touching her. When the complainant did so, she did not receive any shocks.

8. In July of 1986 officials of the Occupational Health and Safety Division of the Ministry of Labour visited the respondent's plant to investigate possible shocks from the Chrysler line. On July 21, 1986 Dr. A. M. Muc, Supervisor, Non-Ionizing Radiation Safety, issued a report with respect to the visit. That report is set out in full below:

Drs. G. Goldberg and A. M. Muc visited Northern American Plastics to observe the workplace and discuss static discharges.

Observations confirm the conclusion that static discharges (shocks) which might be associated with the work are not of themselves likely to endanger the health of any worker.

Some general measures which should serve to moderate or eliminate any shocks that might occur are suggested.

Last March (1986) the question of whether static shocks received from handling plastic parts might endanger the health of a worker was raised by Mr. Don Hall, IHSB Sarnia in a telephone conversation. The concern arose from a work refusal at North American Plastics Ltd. in Wallaceburg, Ontario. Mr. Hall was advised that such shocks are not uncommon during the winter heating season when relative humidity levels often drop to particularly low values and that though such shocks, if repeated could be very annoying, they were not known to be damaging. They occur whenever objects at different electrical potentials (voltage) are brought into contact. When humidity levels are normal or high, the ambient air is sufficiently conductive that the voltage differences cannot become large. Thus even though charge transfers still occur they are less effective in establishing large potential differences. Consequently discharges (shocks) are not perceptible. On the other hand when humidity levels are low, voltage differences can become large and then discharges (shocks) accompanied by arcs (sparks) will occur. It is not uncommon for potential differences of 10,000 V or more to occur and if the air is very clean, voltages as high as 30,000 V and above may occur. Fortunately the amount of charge available to be transferred is small so that the currents occurring during the discharge are low and not harmful. Most people experience such shocks from time to time after walking across a carpeted area and touching a metal object or another person.

The worker who is most concerned about the shocks is Ms. Marie Roy. During our discussions about the situation she indicated she had experienced arcs as long as 5 cm although typically they were only about 1 cm in length. On the other hand, other workers reported they had never experienced any shocks in as many as three years of work on the line in question. This presents a confusing picture since it is virtually impossible for one individual to experience shocks under conditions where another does not.

Although shocks were not occurring at the time of our visit, the work situation observed remains a clear candidate for producing shocks under low humidity conditions. Several factors contribute to that potential among them - the use of an air line to blow dust and particles from the surface of the vinyl door parts, the virtually universal use of rubber soled footwear, the sliding of cartons along the floor and the handling of sheets of polyethylene used to separate individual parts within the cartons.

At least three measures are available to eliminate shocks or at least moderate their severity when they might occur.

- i) Monitor humidity levels and ensure that relative humidity does not fall below about 30%. (This would normally only apply during the heating season).
- ii) Instal a static eliminator cartridge of appropriate capacity on the air line. (Suitable devices are available from 3M).

- iii) Encourage the use of more conductive footwear - natural (i.e. leather) soles rather than synthetics (i.e. rubber foam, neolite, crepe, etc.)

9. Given all of the evidence, we are satisfied that at times employees did receive static shocks from the Chrysler line, particularly under low humidity conditions. Such shocks are not harmful, and no employee other than the complainant raised a concern about them. We are unable to accept the complainant's claim that she received a shock whenever she touched a part on the line. In this regard we note both Dr. Muc's opinion that it is virtually impossible for one individual to experience shocks under conditions where another does not, as well as the fact that the complainant did not receive any shocks when she touched parts on the line during Mr. Mortensen's investigation. Having said this, however, we do not doubt but that on occasion the grievor did receive static shocks off the line.

10. On March 10, 1986 an incident occurred which did not involve static shocks. The complainant was assigned to tape lower parts on the Chrysler line. According to the complainant, the fork lift operators had pushed the boxes containing the parts too close to the line, with the result that a part on the line pushed her into a box. The complainant advised a foreman of what had occurred. The foreman flagged down both of the fork lift drivers on duty and told them not to push the boxes so close. According to the complainant, one of the fork lift drivers initially objected to the direction, but subsequently did obey it. Upon learning of what had occurred, Mr. Lemak discussed the matter with the complainant and agreed with her suggestion that a railing be installed to ensure the boxes were not pushed too far forward. Mr. Lemak then transferred the complainant to other work while the railing was being installed. The complainant characterized what occurred as a work refusal, in that she refused to continue to work without a railing. Mr. Lemak, however, characterized it as a recommendation from the complainant which he acted on. On March 11, 1986 the complainant telephoned the Sarnia office of the Industrial Health and Safety Branch and advised Mr. Hall the Manager of what had occurred.

11. On March 12, 1986 the complainant was one of several employees who were laid off. The complainant testified that initially she saw nothing unusual about her layoff, particularly given that she knew that several employees with more seniority than her had also been laid off. Subsequently, however, the complainant became concerned about the propriety of her layoff when two employees from another department with less seniority than she spent some time working in her department. The company contended that the movement of the two more junior employees was permitted by a collective agreement provision allowing the company to make temporary adjustments without regard to seniority. The complainant pursued the matter of her layoff, and on March 13th the complainant, accompanied by two representatives of the union, met with Mr. Brown to discuss the matter. Following discussions about the layoff, Mr. Brown mentioned that he had been advised that the complainant had telephoned the Industrial Health and Safety Branch concerning the events of March 10th. Mr. Brown referred the complainant to certain provisions in the collective agreement which set out a procedure for dealing with health and safety concerns. The complainant replied that nothing in the collective agreement could prevent her from relying on her rights under the Act. Mr. Brown agreed with this contention, but indicated he would prefer to handle matters internally. Mr. Brown also indicated that he had been advised by several employees that on March 10th the complainant may have deliberately fallen into the box. The complainant vehemently denied that this had been the case. Following the meeting on March 13, 1986, the union filed a formal grievance challenging the propriety of the complainant's layoff. The company continued to assert that the layoff had been proper. On June 12, 1986 the union's executive board grievance committee considered the matter and decided not to proceed any further with the grievance.

12. The complainant contends that her layoff on March 12th was a reprisal for her conduct

on March 10, 1986. It will be recalled that immediately after the events in question the fork lift drivers were directed not to push the boxes as close to the line as they had been doing. Mr. Lemak subsequently discussed the incident with the complainant and agreed with her suggestion that a railing be installed. The railing was installed shortly thereafter. In that the respondent's officials agreed with the concerns raised by the grievor and took immediate corrective steps, it seems highly unlikely that they would subsequently lay her off for having raised her concerns. In addition, other employees were laid off at the same time as the complainant. The temporary reassignment of other employees to work in the complainant's department was apparently sanctioned by the collective agreement. Given these considerations, we are satisfied on a balance of probabilities that the complainant's layoff on March 12th was not likely a result of her actions on March 10th.

13. The complainant was due to return from her layoff on March 17, 1986; however, she called in sick. She did return the following day, March 18th. At the commencement of her shift, Mr. Lemak advised the complainant that she would be assigned to the Chrysler line hanging and cleaning parts. Mr. Lemak then asked the complainant to read and sign job instruction sheets related to the line. The company had previously asked most other employees to read and sign similar work sheets. The complainant indicated that she would not sign the job instruction sheets and would not perform the work because she felt it was unsafe. Mr. Lemak testified that he offered to get someone from the company's health and safety committee to attend, but the complainant refused this offer, insisting instead that a union committee person be summoned. When cross-examining Mr. Lemak, the complainant asked him why he had not allowed her a union representative, to which Mr. Lemak replied that the matter did not require a union representative. The complainant called as a witness Mr. Len Bedell, president of the union. The questions put by the complainant to Mr. Bedell related to the right of employees to union representation. Later, when testifying on her own behalf, the complainant stated that she had told Mr. Lemak she had wanted union representation. When making her final submissions, however, the complainant contended that she had asked Mr. Lemak for a health and safety committeeman. Notwithstanding this claim, we are satisfied on the evidence that in fact the complainant did not ask for a health and safety committeeman but rather for a union committee person.

14. Mr. Lemak testified that while the complainant advised him she felt the job on the Chrysler line to be unsafe, she repeatedly declined to tell him why. This is what Mr. Lemak subsequently reported to other members of management, including Mr. Brown. The complainant, however, testified that she told Mr. Lemak she felt the work was unsafe because she received shocks off the line and had an allergic reaction to the cleaning solvent used on the line. The complainant further contended that when she later talked to Mr. Don Caryn, a union committee person, she also advised him as to the reasons for her refusal. Mr. Caryn, however, denied that this had been the case. Taking all of this evidence into account, we are satisfied that while the complainant advised Mr. Lemak that she felt the job was unsafe, she declined to tell him why.

15. As already indicated, after the complainant refused to read and sign the job instruction sheets, she stated that the job was unsafe and requested that a union committee person be called. Mr. Lemak asked why she felt the job was unsafe, to which the complainant did not reply. Mr. Lemak then asked the complainant if she wanted someone from the occupational health and safety committee to attend. The complainant replied that she did not. The complainant asked Mr. Lemak why she was being harassed. Mr. Lemak responded that she was not being harassed. Mr. Lemak then directed the complainant to wait in the cafeteria.

16. Mr. Lemak went to see Mr. Peter Walker, the respondent's plant manager. Mr. Lemak advised Mr. Walker that the complainant refused to work but would not tell him what was unsafe. Mr. Walker then placed a call on a "speaker phone" to Mr. Brown, the personnel manager, who

was at home ill. Mr. Lemak and Mr. Brown did most of the talking. Mr. Lemak advised Mr. Brown in general terms of what had occurred. Mr. Brown directed Mr. Lemak to again talk to the complainant about having the matter investigated by the plant health and safety committee. It was Mr. Brown's recollection, although not Mr. Lemak's, that he expressly referred to having Ms. Barbara Starr, the employee co-chairperson of the health and safety committee, investigate the matter.

17. Mr. Lemak went to the cafeteria and asked the complainant to accompany him to his office. Mr. Lemak again asked the complainant to read and sign the job instruction sheets. The complainant refused and asked to see a union committee person. Mr. Lemak stated he would bring the safety committee in to check the problem, the complainant indicated she wanted union representation. The complainant, who testified that she always carries a copy of the Act in her purse, brought out the Act, waved it in front of Mr. Lemak and then read from sections 23 and 24 while pointing her finger at Mr. Lemak. It is clear that by this point both the complainant and Mr. Lemak had become quite upset. The complainant was of the view that Mr. Lemak was denying her union representation. Mr. Lemak could not understand why the complainant did not want a health and safety representative. He also felt the complainant was acting inappropriately by waving her finger at him.

18. We would pause at this point to note that in these proceedings the complainant never explained her objection to having someone from the health and safety committee attend. Ms. Starr, the employee co-chairperson of the committee, who is well versed in safety matters, was present in the plant. Although several documents issued by the Ministry of Labour referred to Ms. Starr as the union's safety representative, Ms. Starr testified that as of March 18, 1986 the union had not selected such a representative, although she subsequently applied for the position. Having regard to Ms. Starr's testimony in these proceedings, we incline to the view that had Ms. Starr become involved in the events of March 18th, the complainant's concerns likely would have been resolved in a reasonable manner. For his part, Mr. Lemak's only explanation for not calling a union committee person was that, in his view, the complainant did not require one. Don Caryn, a union committee person, was on the premises. Mr. Caryn testified that had he been called in, he would have arranged for someone from the health and safety committee to attend. He indicated that this was the procedure he had followed in other safety matters. On at least one previous occasion Mr. Brown had himself sought Mr. Caryn's assistance in investigating a work refusal. It is noteworthy that although Mr. Lemak advised Mr. Brown on March 18th that the complainant had indicated she did not want a health and safety representative, he did not tell Mr. Brown that she had requested the presence of a union committeeman. As detailed below, subsequently both Mr. Walker, the plant manager, as well as Mr. Brown suggested that Mr. Caryn talk with the complainant.

19. While Mr. Lemak was meeting with the complainant for the second time, Mr. Brown telephoned Mr. Hall of the Sarnia office of the Industrial Health and Safety Branch to discuss the situation. Mr. Hall advised Mr. Brown that Mr. Mortensen, a health and safety inspector, would be at the plant the following day at 9 a.m. and that Mr. Lalonde, Ms. Starr, the complainant, as well as himself, should be available to meet with Mr. Mortensen. Following his discussion with the complainant, Mr. Lemak again telephoned Mr. Brown. Mr. Brown told Mr. Lemak to have the complainant punch out and return the next day at 9:00. Mr. Lemak passed these instructions on to the complainant, who refused to leave. When giving his evidence, Mr. Lemak was asked why the complainant was not assigned alternative work. Mr. Lemak's reply was that this was not practical in that other employees were on layoff and the company had no other work for her. In fact, however, another employee was subsequently reassigned to the work which the complainant had refused to do, after first being advised of the refusal. The respondent led no evidence as to why the

complainant could not have been assigned to the job that would otherwise would have been performed by this other employee, particularly given that it was still near the commencement of the shift. Taken as a whole, the evidence suggests that at the time management officials did not put their minds to the possibility of assigning the complainant to other work. Rather, Mr. Brown, who was off work ill, simply directed Mr. Lemak to send her home.

20. After refusing to leave the plant, the complainant began to page Mr. Caryn on the company's intercom system. The complainant testified that she paged Mr. Caryn "several times". Mrs. Muriel Hardy, an employee who testified on behalf of the complainant, however, estimated that the complainant was on the intercom for about half an hour. Not knowing how to respond to the situation, Mr. Lemak again telephoned Mr. Brown. Mr. Brown indicated that he would drive out to the plant. As it happened, Mr. Caryn was outside the plant when the complainant began to page him. He testified that on entering the plant he heard the complainant page him 10 or 11 times. Mr. Caryn went to the shipping office to get permission from Mr. Kaminsky, his immediate supervisor, to go and see the complainant. At the shipping office he met Mr. Kaminsky, Mr. Lemak and Mr. Walker, who were discussing the situation. Mr. Walker asked Mr. Caryn if he would go and straighten out the matter. Mr. Caryn made a comment, the full text of which is in dispute, about not wanting to talk to "that lady". In these proceedings Mr. Caryn stated that what he meant was that he did not want to talk with the complainant because she was all worked up. Shortly after this Mr. Brown arrived. Mr. Brown asked Mr. Caryn to advise the complainant that she was suspended for her refusal to punch out, and that if she did not leave, the police would be called. Mr. Caryn went and advised the complainant of what he had been told. According to Mr. Caryn, the complainant was very upset and he had to tell her to slow down because she was talking very quickly. The complainant asked Mr. Caryn why she had been denied union representation, to which Mr. Caryn replied he did not know. The complainant asked Mr. Caryn to repeat his message from Mr. Brown in front of a witness. After receiving Mr. Brown's permission to do so, Mr. Caryn repeated his comments to the complainant in front of Mrs. Hardy. The complainant then left the plant.

21. On March 19, 1986 Mr. Brown sent a letter to the complainant formally advising her of her suspension. The letter read as follows:

Dear Marie:

This letter is to advise you that you are suspended without pay from Wednesday, March 19, 1986, until Friday, March 21, 1986. You are to report to work at your regular starting time Friday, March 21, 1986.

This action is taken as a result of your actions Tuesday, March 18, 1986. Your deliberate insubordination by refusing your Foreman's instructions to punch out and go home. In addition, your refusal to state your concerns on an alleged unsafe working hazard is most serious as it places other employees in danger. Also, your general attitude and threatening tone used towards your Supervisor cannot be tolerated.

I hope that this situation will not occur again and that further discipline is not needed. However, should this situation happen again I will be forced to impose increasing discipline up to and including termination.

22. On March 19, 1986 Mr. Mortensen, the health and safety inspector, arrived. Prior to meeting with Mr. Mortensen, the complainant met briefly with Mr. Lalonde and Ms. Starr. Ms. Starr asked the complainant why she had not called her, to which the complainant replied she did not know who was on the health and safety committee. These three individuals later joined Mr. Brown, Mr. Lemak and Mr. Mortensen in Mr. Walker's office. During the discussion in the office, the complainant indicated that her concern had been with static shock, and that rather than be assigned to other work she had been suspended. The complainant further indicated that the events

the previous day had been due to Mr. Lemak seeking to make her do a job she had refused several times during 1985. Mr. Lemak denied that this had been the case, indicating that while the complainant had raised the issue of shocks in 1985, it had not involved a work refusal. The complainant testified that during the course of the meeting in the office, both Mr. Brown and Mr. Lemak made a lot of statements to her detriment and that they lied about things and then got caught in their lies. No details were given as to these allegations.

23. Mr. Mortensen and the others then went to the work area to investigate the possibility of static shock on the Chrysler line. A number of employees were working on the line. The complainant was asked to touch a part on the line while Mr. Mortensen held her wrist. This was repeated about three times. The complainant did not receive a shock. It was the complainant's testimony that she told Mr. Mortensen that she also had concerns about the cleaner used on the Chrysler line. Mr. Brown, however, testified that there had been no mention of a cleaner. This discrepancy in the evidence was explained by Ms. Starr, who testified that she heard the complainant mention the cleaner to Mr. Mortensen, but that the others present may not have been able to hear what was said. Mr. Mortensen made no attempt to inspect the cleaner. Following his visit, Mr. Mortensen issued the following report:

Special visit to address a work refusal concern.

Persons Contacted:	Mr. M. Brown	Ind. Rel. Supervisor
	Mr. R. Lalonde	Chairperson of U.A.W. Local 251
	Ms. M. Roy	Worker refusing
	Ms. B. Starr	Worker and Health and Safety Committee Rep. of U.A.W. Local 251
	Mr. S. Lemack	Supervisor

Date and Time of Refusal - Mar. 18 @ 15:30 hrs.

To resolve the issue Ms. Roy was requested to return to the operation during the A.M. of March 19/86. Another worker was assigned with notice of prior refusal to perform normal work duties which had caused the initial refusal.

An alleged reprisal activity was noted and statements have been provided or taken.

The concern for refusal was identified as "static shock coming off of the Chrysler line".

The work area was reviewed and it is noted that some workers have acknowledged experiencing similar "shocks" and other workers have not experienced such.

Details of line activity:

Parts measure approx. 78" X 16"

Weight is approx. 10 lbs.

Material - A.B.S. plastic mold 1/4" panel.

Speed - Approx. 15' per inch.

Distance - Approx. 300" on a chain driven free-hanging conveyor

Evaluation of the aforementioned information has deemed that the likelihood of a hazard does not exist and that the effects of "static shock" which could be conveyed from the line is not likely to endanger.

Disposition

No orders are issued relative to the concern of static shock from the "Chrysler line".

Section 23 and 24 of the Act were reviewed and direction to contact the Ontario Labour Relations Board made should (illegible) occurrences relative to the aforementioned (illegible) warrant such action.

24. On June 15, 1986, Ms. Starr wrote to the Ministry of Labour asking for a reinvestigation. Part of the reinvestigation involved the visit of government officials to investigate static shock which led to the report referred to earlier wherein Dr. Muc concluded that any static shocks were not likely to be a danger.

25. The complainant's first scheduled work day after her suspension was March 21, 1986. She did not report for work that day but rather went to see her doctor because, in her words, she was "strung out". Her doctor advised the complainant that due to her nerves she should not go into work but rather apply for sickness and accident benefits from the company. Later that day the complainant was telephoned by "Sandy" in the personnel department who informed her that employees in her department were being laid off. The complainant advised Sandy that she had already been put on sickness and accident by her doctor. Sandy then indicated that the complainant should either pick up a claim form, or have someone else do so for her, which is what the complainant did. The complainant completed the form the following day. Prior to the form being forwarded by the company to Canada Life, the insurance company responsible for benefit payments, Mr. Brown asked that the company nurse handling the claim note on the form that the complainant had been laid off. Canada Life subsequently concluded that due to the complainant's right to bump more junior employees in other departments, her layoff did not disqualify her from receiving benefits.

26. The complainant contended that Mr. Brown subsequently attempted to stop Canada Life from paying her benefits in reprisal for her refusing to work in March. The evidence, however, establishes that it was Canada Life on its own initiative that raised the issue of whether the complainant was medically entitled to benefits. After Canada Life had received certain medical reports from the complainant's doctor, including an oral report, it concluded that the complainant was in fact entitled to receipt of benefits.

27. The complainant continued to receive benefits long after she otherwise would have been recalled to work. Indeed, she was still off work during the currency of the hearings into her complaint. The complainant contends that her nervous problems and resulting lengthy absence from work were caused by the company's conduct towards her, most particularly its conduct on March 18, 1986. The complainant accordingly seeks payment for a seven-day waiting period prior to the commencement of sickness and accident benefits, as well as the difference between sickness and accident benefits and her regular rate of pay. The complainant led no medical evidence to link the problems with her nerves with the events of March 18, 1986. In the absence of such evidence, one would not reasonably expect that the events of March 18, 1986 would give rise to problems with her nerves that would incapacitate her for a lengthy period of time. In these circumstances, we are led to conclude that the complainant's problems with her nerves and resulting lengthy absence from work were likely due to factors not connected with the events of March 18, 1986.

28. As indicated above, we are satisfied that there is no merit to the complainant's allegations insofar as they relate to events prior to March 18, 1986, or subsequent to the complainant's two-day suspension arising out of events on March 18th. We turn now to review the events of that day in light of the requirements of the *Occupational Health and Safety Act*.

29. There is no doubt but that the complainant refused to work on the Chrysler line. Her

refusal was clearly related in part to the complainant's view that she should not have to read and sign the job instruction sheets. However, given all of the evidence, we are satisfied that she was also concerned about her personal safety, and that this concern was a motivating factor in her refusal to work on the line. We do not believe that the complainant's work refusal was related to concerns about the use of the cleaner. Rather, the complainant appears to have raised the cleaner as an afterthought. As noted above, when the complainant raised the matter of the cleaner, she did so in a brief comment to Mr. Mortensen on March 19, 1986 out of earshot of management. The fact that Mr. Mortensen's report of March 19th makes no mention of the cleaner, indicates that he did not perceive the complainant's comment as involving a claim that the cleaner had been one of the reasons for her work refusal.

30. With respect to the static shocks, while we cannot accept the complainant's claim that she continually received shocks off the Chrysler line, as indicated above, we do accept that the complainant received some static shocks off the line. Although Dr. Muc's report issued after the events in question indicates that such shocks will not endanger a worker, we are satisfied that on March 18th the complainant had a real personal concern about the safety of working on the line where she might receive such shocks.

31. Section 23(3) of the Act provides as follows:

A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

Given the wording of this section, we are satisfied that when a worker initially refuses to do certain work, it matters not whether the work is or is not unsafe. Rather, the test is whether the worker had reason to believe that the work might endanger herself or others. We are satisfied that the complainant had reason to believe that working on the Chrysler line might endanger herself. Accordingly, it follows that the complainant had the right to refuse to perform the work.

32. Sections 23(4) and (5) set out the obligations on a worker and employer upon a refusal to do particular work as follows:

23.-(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

33. The complainant was required by section 23(4) of the Act to promptly report the circumstances of her work refusal to management. The circumstances of a work refusal must logically include the reasons for believing the work unsafe, since, without such information, management would be seriously hampered in any attempt to investigate the matter. Mr. Lemak on a number of occasions asked the complainant why she felt the work to be unsafe, and on every occasion she refused to tell him. In failing to provide the information the complainant was herself in breach of the Act.

34. Section 23(4) of the Act states that management, in the presence of a worker who has refused to perform certain work, must forthwith investigate the matter in the presence of:

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them.

Mr. Caryn, the union committee person paged by the complainant, did not fit any of the three categories of persons referred to in section 23(4). While he was a union committee person, in that section 1(1) of the Act defines a “committee” as a joint health and safety committee, he clearly was not a “committee member” referred to in section 23. An individual who did come within section 23(4) and who was at work at the time was Ms. Starr, the employee co-chairperson of the health and safety committee. Had the complainant agreed to Mr. Lemak’s proposal that a member of the health and safety committee be summoned, it is reasonable to infer that the person involved would have been Ms. Starr. Indeed, it will be recalled that Mr. Brown testified that he had expressly mentioned Ms. Starr’s name to Mr. Lemak.

35. The respondent did not investigate the complainant’s work refusal as required by section 23(4). However, given the complainant’s conduct in declining to meet with a member of the health and safety committee as well as her refusal to tell Mr. Lemak why she felt the work to be unsafe, it is doubtful that a meaningful investigation could have been conducted. What the company did do was to immediately proceed to the next step contemplated by the Act, namely an investigation by an inspector. The period prior to an investigation by an inspector is dealt with by section 23(10) which provides as follows:

Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

36. Section 23(10) indicates that pending the investigation by an inspector, a worker is to remain near her work station during her normal working hours unless assigned reasonable alternative work, or if such an assignment is not practicable, the employer gives her other directions. In certain circumstances, such other directions might include sending an employee home. However, such a direction can only be given if the assignment of reasonable alternative work is not practicable. As already indicated, we are of the view that in all likelihood reasonable alternative work was

available to which the complainant could have been assigned. We do not view the company's decision to send the complainant home as being motivated by a desire to penalize her for her refusal to work. Nevertheless, the failure to assign her alternative work in the circumstances of this case, amounted to a penalty to the complainant contrary to section 24 of the Act in that it resulted in a lowering of her take-home pay.

37. It will be recalled that the complainant was suspended for two additional days for refusing to follow Mr. Lemak's instructions and punch out on March 18th. The complainant contends that this was a further penalty imposed on her for exercising her right to refuse work she believed unsafe. As indicated above, we believe the respondent should have assigned alternative work to the complainant and not sent her home. Notwithstanding this, we are also satisfied that the complainant's conduct in refusing to leave the plant and then using the paging system for approximately half an hour was not an appropriate response. Other means were open to the complainant to challenge the respondent's conduct. In all the circumstances, we are satisfied that the suspension was not a reprisal for the complainant's refusal to work, but disciplinary action for her inappropriate behavior. Notwithstanding this conclusion, however, we are of the view that a two-day suspension was not an appropriate response. While the complainant acted inappropriately, had Mr. Lemak been more flexible, the entire situation could likely have been resolved. Section 24(7) of the Act, which is set out below, gives the Board a discretion to modify a disciplinary penalty in a situation such as this:

24.-(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

Given all of the circumstances, we are of the view that a one-day suspension would have been a much more appropriate penalty. Accordingly, we direct that a one-day suspension be substituted for the complainant's two-day suspension. The complainant is to be compensated for her losses with respect to the other day.

38. While we have found a number of the complainant's allegations to be without merit, we have concluded that the company breached the Act by sending the complainant home on March 18th and that the two-day suspension imposed on the complainant for her improper conduct that day was, in all the circumstances, unduly severe. These findings are not, however, meant to indicate our approval of the complainant's conduct. Her refusal to meet with a member of the health and safety committee and to advise the company as to why she felt working on the Chrysler line was unsafe can only be viewed as ill-considered and irresponsible and, as noted above, resulted in the complainant herself breaching the Act.

39. We will remain seized of this matter in the event the parties are unable to agree upon the amount of compensation payable to the complainant.

CONCURRING OPINION OF BOARD MEMBER D. A. PATTERSON;

1. I concur with the decision of the Board with the following concurring opinion.

2. The Board was faced with a number of alleged incidents which the complainant charges were and are related to the work refusal on March 18, 1986.

3. The Board did address these allegations and dealt with each of them. The allegation around the refusal is the issue the Board is charged to make its findings on.

4. The Board heard evidence that the complainant was discharged shortly after her commencement of work at North American Plastics. The complainant filed a complaint with the OLRB in late '84 alleging a breach of section 24 of the *Occupational Health and Safety Act* ("the Act"). The complainant and respondent settled the matter in February 1985 with the complainant being reinstated. The complainant stated that since her reinstatement, all these incidents have arisen and are connected to her original discharge and subsequent reinstatement.

The Allegations

5. The alleged incidents which the complainant claims are part of the respondent's actions against her are:

1. the use of Cleaner 109;
2. incident in which she fell in a parts box;
3. improper layoff;
4. refusing to sign work sheets;
5. refusing to punch out and leave company premises.

All these items are not part of the complaint before the Board. It is my opinion they are a labour relations matter or a matter which should be addressed by the in-plant Safety & Health Committee. While there is a definite link between labour relations and safety and health and the practitioners of labour relations often get the two mixed up, it has been my experience in this case that the complainant used what she thought that she was entitled to under the Act. The Act itself is not a collective agreement and is not to be treated in the same fashion as alleged violations of the C.B.A.

6. The respondent in this case did not follow the procedure as laid out in the Act resulting in the complainant being sent home and receiving a letter from the respondent's agent, Mr. Brown, giving her 3 days off and threatening her employment with the respondent.

7. Under section 24, I concur with the Board that she should not have been penalized for her refusal under section 23 of the Act. The complainant's knowledge and utilization of the Act is entirely her legal right on the job. Once the company treated the complainant's action as a refusal, then the respondent was charged with its responsibility to follow the Act.

8. Section 24(1) of the Act clearly spells out what the employer cannot do if an employee exercises his or her rights under the Act. That section provides:

No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

9. I conclude by saying that if the employer had not overreacted in this situation, the entire matter could have been rectified the same day.

1267-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Omstead Foods Limited, Respondent

Certification - Pre-hearing Vote - Ballots cast in favour of applicant and against applicant equal with one segregated ballot - Agreement of parties that employee who cast segregated ballot included in unit - New vote ordered to protect secrecy of ballot cast by employee

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *W. G. Donnelly* and *J. Sarra*.

DECISION OF THE BOARD; February 11, 1987

1. By decision dated September 4, 1986, the Board directed that a pre-hearing representation vote be held in this application for certification. The Board further directed that the ballot box be sealed and the votes not be counted until further order of the Board. By decision dated December 9, 1986, the Board ordered that the ballot box be opened and the votes counted, subject to objection by either of the parties. No such objection was made and the box was opened and the votes counted. No statement of desire to make representations has been filed with the Board within the time fixed under section 70(2) of the Board's Rules of Procedure following the taking of the vote.

2. The number of ballots cast in favour of the applicant and of those cast against the applicant were equal. There was one spoiled ballot and one segregated ballot. By letter dated January 13, 1987, counsel for the respondent informed the Board that the union had agreed that the employee who cast the segregated ballot, Paul Moody, should be included in the bargaining unit. The respondent's position, therefore, is that "in keeping with the Board's long-standing [sic] practice to protect the secrecy of all ballots, ... a new vote should be ordered herein". That letter having been sent to the applicant for comments, counsel for the applicant advised the Board that the applicant concurred in the respondent's request for a new vote. Counsel for the applicant also confirmed that the applicant would not pursue its application under section 8 of the *Labour Relations Act* should the Board order a new vote in this matter.

3. Having regard to the parties' agreement and to the Board's usual practice where counting a segregated ballot will reveal the reference of the employee who cast the ballot, the Board directs that a new vote be held in this matter: see *SGS Supervision Services Inc.*, [1981] OLRB Rep. Oct. 1471. The new representation vote will be taken of the employees in the following voting constituency: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain".

4. All the employees of the respondent in the voting constituency on the date hereof who have not voluntarily terminated their employment or who have not been discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

5. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

6. This matter is referred to the Registrar.

0460-84-R Alliance Employees' Union, Applicant, v. Public Service Alliance of Canada, Respondent, v. The Ottawa Typographical Union, Local 102, Intervener

Certification - Practice and Procedure - Parties requesting Board amend certificate issued in 1984 to reflect existing configuration of employees - Certificate redundant once collective agreement with recognition clause entered into - Parties able to amend recognition clause of collective agreement to clarify its scope

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *J. Sarra* and *G. Shamanski*.

DECISION OF THE BOARD; February 10, 1987

1. On January 20, 1987, the Board received a joint submission from the Alliance Employees' Union ("the Union"), and the Public Service Alliance of Canada ("the employer") framed as follows:

This is a joint proposal made by the Alliance Employees' Union (the Union) and the Public Service Alliance of Canada (the Employer) to have our Certificate amended to reflect the exclusion of positions on the basis of either managerial or confidential duties. It is noted and agreed that this joint submission is solely to update our certificate to reflect today's terminology. It in no way implies that either party may not, at some point in the future, make separate submissions regarding exclusions.

We agree that the following positions should properly be excluded from the operational bargaining unit represented by the AEU:

1. All employees who are covered under a subsisting collective agreement in another bargaining unit.
2. All elected and appointed officers of the Public Service Alliance of Canada.
3. All Branch Directors (managerial).
4. The Personnel Officer and Personnel Administrative Assistant (confidential).
5. The Assistant Executive Secretary (confidential).
6. The Assistant to the National President (confidential).
7. The Administrative Assistant and Secretary to the National President (confidential).
8. The Secretary to the Executive Vice-President responsible for Finance and Administration, the Secretary to the Comptroller, the Secretary to the Executive Secretary (all confidential).

The parties hereby jointly request that the appropriate certificate be amended according to this joint submission.

Brian Reid
Executive Secretary
for the Employer

John Sullivan
President AEU
for the Union

As will be seen, the parties request the Board to amend and “update” a certificate issued in 1984, in order, they say, to reflect the existing configuration of employees and persons who would not be “employees” pursuant to section 1(3)(b) of the *Labour Relations Act*.

2. We shall treat this letter as a request for reconsideration made pursuant to section 106(1) of the Act; however, for reasons set out below, it is our opinion that the request is without merit and unnecessary.

3. A Board certificate defines the initial scope of the union’s bargaining rights, requires the employer to recognize the union for that bargaining unit, and gives the union a “licence” to commence negotiations. However once those negotiations have produced a collective agreement, it is *that collective agreement* (and in particular its “scope clause”) which defines the parties and the extent of the union’s bargaining rights. As the Board observed in *Gilbarco* [1971] OLRB Rep. March 155:

“...The parties are free to amend, alter, extend or abridge the bargaining rights contained in the certificate. Where bargaining rights in a collective agreement are not as extensive as those contained in a certificate, then that is *prima facie* evidence of the abandonment of that portion of the bargaining rights contained in the certificate but not contained in the collective agreement. In effect, the collective agreement supplants the rights given by the Board’s certificate and the Board’s certificate is spent once the collective agreement is signed. Or to put it another way, the best evidence of the bargaining rights extant are those contained in the collective agreement. In the same way as bargaining rights in a collective agreement supplant rights contained in a certificate, so too bargaining rights in subsequent collective agreements may supplant bargaining rights contained in prior collective agreements.”

In this regard the Board was merely restating the views expressed by Chief Justice Laskin in *Beverage Dispensers and Culinary Workers Union, Local 835, et al vs. Terra Nova Motor Inn Ltd.*, 74 CLLC ¶14,253 (S.C.C.). He commented: “once a collective agreement is negotiated, the certificate has served its purpose and is, for all practical purposes, spent”. (See also *Chapples Limited* [1974] OLRB Rep. Dec. 897).

4. We recognize that in some other jurisdictions under different statutory schemes, tribunals have asserted the right and responsibility to continually monitor bargaining relationships which were established many years (sometimes decades) ago. Those tribunals assert that whenever there is a new classification created which might arguably fall outside the scope of the collective agreement but within the notional group that the union “should represent”, an application must be made to amend the old certificate. This, it is said, requires the parties to amend their collective agreement accordingly.

5. This Board has never taken that view. It has held that once the parties have entered into a collective agreement with a recognition clause as required by section 42 of the Act, the certificate is redundant. Indeed, that is why this Board frames its bargaining units in broad “generic” fashion with specific exclusions (i.e. all employees, save and except) so that newly created classifications *automatically* fall within the bargaining unit unless specifically excluded. This Board

does not, and has not asserted the authority to direct a modification of the parties' collective agreement upon the creation of classifications which might have been included in the bargaining unit, if they had been in existence at the time the certification application was made. They either fall within the agreed terms of the agreement or they don't. The only exception involves persons who may exercise managerial functions or be employed in a confidential capacity in matters relating to labour relations. In that case, section 106(2) of the Act gives the Board specific authority to determine who is an "employee" for its purposes, and therefore *eligible* for inclusion in a bargaining unit described in a collective agreement. However, even then, whether a person *eligible* for coverage is, *in fact*, covered by the terms of the agreement, will depend upon the specific contract language. Where, as here, the parties are agreed upon certain exclusions they may amend the collective agreement themselves, without the intervention or approval of this Board (see *Northern Telecom* [1983] OLRB Rep. July 1134).

6. For the foregoing reasons, the Board finds that it is neither necessary, nor effective to "amend" or "update" the Board certificate issued in 1984. If the parties wish to accomplish the objective outlined in their joint submission, they are perfectly capable of doing so on their own, by simply amending the recognition clause of their current collective agreement to clarify its scope.

0114-85-U; 0117-85-M Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Applicant/Complainant, v. Rexwood Products Limited, Respondent

Employee Reference - Interference in Trade Unions - Unfair Labour Practice - Employer purportedly promoting employee to supervisory position and paying him more than wage rates in collective agreement - Employee not exercising managerial functions and continuing to be an employee for purposes of the Act - Employer breaching ss.64 and 67 in bargaining directly with employee with respect to his wage rate and in its attempt to circumvent the provisions of the collective agreement

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *R. J. Gallivan* and *L. C. Collins*.

APPEARANCES: *Paul Falzone*, *Marcel Lacroix*, *Sid Adams* and *Rocky Skinner* for the complainant/applicant; *Michael G. Horan* and *Jack Lacarte* for the respondent.

DECISION OF THE BOARD; February 27, 1987

1. As noted in an earlier decision in these proceedings, dated August 9, 1986, these two matters are a complaint filed pursuant to section 89 of the *Labour Relations Act*, alleging violations of sections 50, 64 and 67 of the Act, and an application pursuant to section 106(2) of the Act, asking that the Board determine whether a particular individual is an "employee" for purposes of the Act. In the prior decision, the Board declined to defer these matters to arbitration.

2. The union alleges that an employee within the bargaining unit, Mr. Gaetan Touzin, has been removed improperly from the bargaining unit by the respondent employer seeking to promote Touzin to a supervisory position outside coverage under the collective agreement. In its application under section 106(2), the union alleges that there has been no material or substantial

change in Touzin's duties and responsibilities, that he was included under the collective agreement prior to his purported promotion, and that he does not exercise managerial functions within the meaning of section 1(3)(b) of the Act. The union further alleges that the respondent employer was motivated by a desire to avoid dealing with the union, or, alternatively, a desire to circumvent the provisions of the collective agreement, and is thereby in violation of sections 64 and 67 of the Act. The employer's attempt to exclude Touzin from coverage under the collective agreement is also allegedly contrary to section 50 of the Act.

3. Except for disagreement over the duties and responsibilities exercised by Touzin subsequent to the promotion, the parties were not in substantial dispute with respect to the relevant facts. Touzin was initially hired by the respondent in January, 1978 as an electrician. Touzin had previously been working for another employer in the area, and in order to attract him, the respondent had to offer Touzin more money than the collective agreement provided at that time for employees in his category. The day after he began to work for the company, the company advised the union of its intention to pay Touzin a wage greater than the collective agreement provided. The union raised no objection at the time. Pursuant to this special arrangement with Touzin, the company did pay him the higher amount for some period, although the evidence is unclear as to how long such payments continued. What was clear from the evidence was that shortly after a wild-cat strike in 1979, Touzin reverted to the wage rates contained in the collective agreement, and by that time the union had raised its objection to the higher wage rate.

4. In the late summer or early fall of 1984, Jack Lacarte, Vice-President and General Manager of the respondent, met with Touzin to discuss his work situation. Lacarte testified that during this conversation, Touzin raised his concern with his wage rates and indicated that he wanted to receive more money than the collective agreement provided for him. Touzin indicated to Lacarte that if he was going to be asked to take more responsibility in the electrical department, he wanted to be made a supervisor. There was also some discussion at that time about the possibility of contracting out the electrical work to Touzin, but Lacarte indicated that was not a satisfactory approach as the company could not then rely upon Touzin's services to the extent they felt necessary. Lacarte further testified that in the late summer or early fall of 1984, he offered to make Touzin a supervisor. Mr. Touzin made clear to Lacarte that if he did not receive more money he would be leaving the employ of the respondent.

5. The company notified the union in a letter dated January 15, 1985, that Touzin was removed from the bargaining unit as of January 1, 1985. As that letter stated, "It has been the desire of the company to have Mr. Touzin work on a contract basis and he is pleased to accept the changeover". Also on January 15, 1985, Lacarte provided to the union a list of current supervisors in the plant. Touzin was not listed as a supervisor; only his supervisor, Peter Lemon, was listed as "electrical supervisor". It is common ground that the only two electricians at the plant throughout the entire relevant period were Lemon and Touzin. Two days after the letter noting that Touzin was going to work on a contract-out basis, the union responded indicating their objection on the basis that "the classification of electrician or any other classification listed in the collective agreement cannot be removed from the bargaining unit. The only employees in the plant and yard that are outside the bargaining unit are supervisory personnel...". On February 21, 1985, the union filed a grievance objecting to the purported removal of Touzin through contracting-out, as set out in the company letter of January 15th. The company's response to the grievance was dated March 11, 1985, and noted that Touzin had been appointed electrical supervisor, effective January 1985 (the same time it purported to have contracted out work to Touzin), and, as such, was outside coverage of the collective agreement. On the same date, the company provided to the union a revised list of its supervisors, retroactive to January. The only change on this list of March 11th, from the list of supervisors provided in January, was that Touzin had been added as electrical supervisor.

Again, we note that the supervisors list provided on January 15, 1985, and presumably up to date as of that day, did not list Touzin as electrical supervisor. It was only the subsequent list issued March 11, 1985 (after the union had grieved objecting to the purported contracting out to Touzin) that listed Touzin as supervisor, but effective January 15, 1985.

6. Although Lacarte testified otherwise, we find as a fact that the union was not advised that Touzin was purportedly made supervisor until it received, around March 13, 1985, the reply to the grievance indicating that Touzin had been promoted and the list of supervisors retroactive to January 15th. Lacarte explained the peculiar timing of the notices as follows. The notice sent to the union on January 15th indicating that Touzin was going to work on a contract-out basis was sent when Lacarte was "considering making him a contractor". When the union objected on January 17th to this course of action, it more or less confirmed Lacarte's decision that the contracting out was inappropriate and he, accordingly, took steps to stop it. At that stage he "could see that there was no way he was going to receive any co-operation" from the union (presumably in his attempt to pay Touzin more than the collective agreement wage rates) and he went ahead with making Touzin a supervisor, as he had intended since late summer or early fall of 1984. He so promoted Touzin within the first two weeks of January 1985, but did not advise the union at that time because of the "rule of thumb" that the union was only advised within three months of any such promotions. Lacarte offered no explanation as to why the supervisors list of January 15, 1985 did not contain Touzin's name. There was no suggestion that the union was ever aware of Lacarte's or the respondent's direct dealings with Touzin over his wage rates, nor any suggestion that it endorsed such direct discussions.

7. With this evidentiary background we turn to consider the first issue before us: whether Touzin exercises such managerial duties and responsibilities that in our opinion he ought to be found to fall within section 1(3)(b) of the Act. The classification of electrician is covered by the collective agreement and Touzin was admittedly an "employee" and subject to that collective agreement prior to January 1985 and his purported promotion. The Board must ask itself whether there has been any noticeable change in those duties and responsibilities subsequent to January 1985. For reasons given below, the Board is not satisfied that Touzin is not an "employee" for purposes of section 1(3)(b) of the Act and we do not find that he exercises such managerial functions as to be excluded from coverage under the Act.

8. Lacarte identified in evidence a job description he had drawn up indicating the duties and responsibilities of Touzin subsequent to the promotion. Lacarte testified that the job description accurately reflected those duties and responsibilities. There was no other evidence led, by either party, which suggested that Touzin might exercise managerial functions such that he ought to be excluded from coverage under the Act. The Board is not prepared to give any significant weight to this job description and Lacarte's assertion that it accurately reflects Touzin's job functions. We say this for several reasons. First, the job description was drawn up in September of 1985, approximately nine months after the purported promotion took place, and several months after these two applications were filed with the Board. The job description was not shown to the union prior to its introduction at the hearing into this matter. Second, Lacarte himself acknowledged in his testimony that Horst Breunig, the plant supervisor, was the immediate supervisor of all supervisors within the plant, including Touzin, and that all the supervisors reported directly to Breunig, not to Lacarte. Lacarte indicated that if he wanted information about any of these individuals that his immediate contact was Breunig. Based on his own testimony, it does not appear that Lacarte would have interacted to any meaningful extent with Touzin in his performance as supervisor. Third, one of the union witnesses in cross-examination indicated that he participated in a discussion on or about February 14, 1985, in his foreman's office, and also participating in the discussion was plant supervisor Breunig. The union witness testified that they had been discussing

Touzin's status and wages, and during the course of the discussions Breunig indicated that Touzin's job content and duties and responsibilities had not changed subsequent to his purported promotion, only his wages had. Breunig is of course the same individual whom Lacarte himself indicated directly supervised Touzin. The company did not call Breunig to testify and the evidence that Breunig felt Touzin's duties had not changed remains unchallenged. Parenthically, we note that Touzin was present in the hearing room and available to be called as a witness but also was not called to testify. Fourth, the evidence that was led, through Lacarte and the job description and the union's cross-examination of Lacarte, suggested that Touzin's duties and responsibilities had not changed subsequent to the promotion in any meaningful respect from what they had been prior to January of 1985. Any managerial aspects of those duties and responsibilities are incidental to the prime purpose and functions performed by Touzin. For all these reasons, the Board finds that Touzin does not exercise managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*, and we find that he is an employee for purposes of the Act.

9. We turn now to consider whether the company has violated any of the pleaded sections of the *Labour Relations Act*. The company wanted to pay Touzin more than the wage rates contained for his classification in the collective agreement, as it reasonably feared he would quit if he did not receive higher rates. The company understandably wished to retain his services, and it tried to find some way to pay him more than the collective agreement provided. After paying him a higher rate for a time, it became apparent to the company that the union continued to object to such payments and accordingly the company began to pay him the rate contained within the collective agreement. Touzin remained unhappy with this arrangement, made this clear to the company in discussions with Lacarte, and the company again attempted to find a way to pay him more. At that time, the company was well aware that the union objected to Touzin receiving more than the collective agreement wage rate. The respondent tried to accomplish this by having Touzin work on a contract basis, rather than as an employee, and took immediate steps to notify the union of this approach. When the union objected (reaffirming its long standing position), by its letter of January 17th and by filing a grievance on February 21, 1985, the company purported to promote Touzin to supervisor, and thereby out of coverage under the collective agreement. It is clear that the purpose of the purported promotion was at least in part based on a desire to circumvent the provisions of the collective agreement and to enable the respondent to pay Touzin a higher wage. The company effectively conceded this factual conclusion in its submissions before the Board.

10. In final submissions, the union conceded the company did have a business reason to want to retain Touzin's services, and to therefore want to pay him more than the collective agreement rates, but the union submitted that if the means to effect this purpose was illegal, then an unfair labour practice was still committed. Counsel submitted that what has really occurred is that the company has attempted to deal with Touzin directly and on an individual basis, as it was unsuccessful in getting Touzin's exclusive bargaining agent to agree to higher wage rates. In effect, the company through this scheme of conduct has attempted to get around the provisions of the collective agreement and the requirement of negotiating with the union and it is that intent and course of action which elevates this scheme to a violation of sections 64 and 67 of the Act. The applicant further submitted that the company wants to remove Touzin from the bargaining unit, not only to pay him more money, but also to undermine the bargaining power of the union by reducing the size of the bargaining unit, and should there be a strike in the future, by ensuring that Touzin will be able to work and the company will be able to continue to conduct business during the strike period. The union made no submissions with respect to the alleged violation of section 50 of the Act.

11. Counsel for the respondent submitted that no unfair labour practice had occurred, as the company had a legitimate reason for its conduct, and the employee in question benefitted thereby. There was not present any anti-union animus or any attempt to avoid dealing with the union; to

the contrary the company notified the union each time of what it was purporting to do and when the union objected, firstly, to Touzin being paid more than the collective agreement rates, the company stopped so paying him and secondly, when the union objected to the contracting out arrangement, the company cancelled that as well. The legitimacy of the promotion can properly and appropriately be tested through resort to an independent third party adjudication, arbitration. As every action was done openly and with the union being advised, if the promotion was in fact valid and Touzin is not covered under the provisions of the collective agreement, it cannot be said that the company has committed an unfair labour practice in so promoting him.

12. Section 50 of the Act reads as follows:

“A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.”

Both because the union made no submissions with respect to the alleged violation of this section, and because it is unnecessary given our findings with respect to section 64 and 67 of the Act, we do not propose to consider section 50 further.

13. Section 64 of the Act reads as follows:

“No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.”

14. Although prior cases of the Board on point have generally dealt with employer communications to employees during negotiating or bargaining conduct, they provide some assistance. In *The Citizen*, [1979] OLRB Rep. March 177, the Board made the following comments (at paragraph 56 therein):

“Counsel’s complaint about *The Citizen*’s statements of July 19th, and the statements contained in its July 24th offer, raise again the issue of the propriety of an employer communicating directly with its employees during the course of negotiations. The question of the extent to which an employer may engage in such communications was fully canvassed by the Board in *A.N. Shaw (supra)*. In that case the Board stated that although employers must be circumspect when communicating with their employees, especially during negotiations, not all communications between employers and employees are prohibited by the Act. Section 56, prohibiting employer interference with the formation, selection or administration of a trade union, or the representation of employees by a trade union, expressly provides that this very general prohibition does not ‘deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats or undue influence’. It is only when communications between employer and employees go beyond the bounds of legitimate freedom of expression and encroach upon the union’s exclusive right to bargain on behalf of its employees that they become illegal. Such communications become illegal only when they represent, ‘in reality’, an attempt to bargain directly with employees. Direct bargaining with employees is expressly prohibited by section 59 [now section 67] of the Act.”

And see *Extendicare Health Services Inc.*, [1985] OLRB Rep. Nov. 1578.

15. Whether or not direct negotiations with an employee, who is represented by a trade union, with respect to altering the wages under which the employee will work constitutes interference with the “administration of a trade union”, it is clear that such negotiations or discussions would interfere with “the representation of employees by a trade union” within the meaning of

that phrase in section 64. Regardless of whether the respondent had business interests at stake, its conduct in discussing with Touzin, privately and in the face of its knowledge that the union objected to Touzin receiving higher rates than in the collective agreement, was at least partly motivated by an intention to avoid the collective agreement. Such discussions were clearly designed to attempt to negotiate his wage rates with Touzin directly. Direct dealings with an employee which circumvent the union's exclusive bargaining rights, at least where, as here, they are for the explicit purpose of avoiding the provisions of the collective agreement (even where higher rates are being negotiated) constitute interference with the representation of an employee by his or her trade union. The union is authorized under the scheme of the Act, and upon obtaining bargaining rights with respect to the employees whom it represents, to act as the exclusive bargaining agent of those employees. Any attempts by employers to detract from that exclusivity and to deal directly with an individual bargaining unit member, where it is clear that the employer intended to deal directly with the employee in an attempt to negotiate terms and conditions of employment that differ from the collective agreement provisions, violates section 64. That the individual employee was a willing participant in such discussions, or that the discussions were designed to pay the employee more than the collective agreement provided, does not excuse their illegality. It is the union's right, obtained in the instant case through certification proceedings and the awarding of bargaining rights, that is at stake and which must be protected under section 64.

16. It is no defense for the respondent to note it advised the union throughout once it had taken its various positions; for example, it immediately advised the union of its contracting out to Touzin and similarly advised it upon promoting Touzin to a supervisor's position. The illegal aspect of the company's course of conduct lies in its intentionally dealing directly and on an individual basis with Touzin for the reasons it did, and thereby circumventing dealing with his exclusive bargaining agent. The company first attempted to negotiate a higher wage rate with the union's awareness and compliance, but once it was clear the union would not accept such individual treatment, the company turned to directly discussing with Touzin how to nevertheless accomplish paying him higher wage rates. Although the union did not object to such higher rates when Touzin was first hired, by 1979 it was clear to the company that the union did so object and notwithstanding such objection, the company continued to discuss individually with Touzin how to accomplish such an end. Such conduct in these circumstances can only be viewed as an attempt by the company to bargain directly with the individual employee with respect to getting around his wage rates as set out in the collective agreement, and such conduct we find violates section 64.

17. Section 67(1) of the Act reads as follows:

"No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them."

18. The Board considered the effect of section 67(1) in *American Can Canada Inc.*, [1983] OLRB Rep. Oct. 1609 where it wrote, in part, as follows in paragraph 9 therein:

"As noted by the Board in *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393, at paragraph 17, the scheme of the *Labour Relations Act* contemplates that the acquisition of bargaining rights by a union carries with it an exclusive license to bargain on behalf of the employees in its bargaining unit. That exclusivity of the union's bargaining rights is expressly protected by section 67(1) which prohibits employers from bargaining directly with employees represented by a union. It is apparent from the facts set forth above that for over twenty-five years the employer has recognized the complainant as the exclusive bargaining agent for the (bargaining unit) employees at its Hamilton plant. It is also apparent that, far from attempting to bargain directly with those employees, the respondent, through the impugned direct communications with

employees, has been attempting to arrange a meeting with the Executive of Local 354, as the employees' duly recognized bargaining agent, to discuss an extension to the collective agreement currently in force. Thus, the substance of those direct communications clearly indicates that at all material times it was the intention of the respondent to continue to recognize the complainant as the exclusive bargaining agent for its Hamilton plant employees. Accordingly, we are satisfied that neither the respondent, nor any person (or organization) acting on behalf of the respondent, has bargained with (or entered into a collective agreement with) any person or trade union other than the complainant in respect of the Hamilton plant bargaining unit. Accordingly, we find that there is no merit in the complainant's allegation that the respondent has contravened section 67(1) of the Act."

19. As can be seen, the Board in that case found no violation of section 67(1) in that respondent's conduct. In our circumstances, distinguishing it from those before the Board in *American Can Canada Inc.*, it was clear to the respondent that the union was not condoning the respondent's conduct in dealing directly with Touzin, and in fact the evidence suggests the union was not aware that the respondent continued to deal directly and individually with Touzin. As well, the substance of the communications before us, and their purpose, were both clearly designed to circumvent the role of the union as exclusive bargaining agent for Touzin, and its role in negotiating for his terms and conditions of employment, along with the terms and conditions of employment for the other employees whom it represented. The conduct complained of did not involve border line communications, condoned previously by the applicant, but rather involved a series of direct bargaining attempts, motivated by a desire to get around the provisions of the collective agreement, and ultimately leading to purported promotion of the employee out of the bargaining unit. The breach was committed when the employer attempted to negotiate directly with Touzin, absent the union's consent, with respect to his terms and conditions of employment. That the intention of such negotiations was to circumvent the provisions of the collective agreement, for the purposes of section 67, merely reinforces the need to proscribe such activity. The gravamen of the violation of section 67(1) was the employer's direct negotiations or dealings with Touzin about one of his terms of employment, without having obtained authorization from the union for such negotiations, and we find that the respondent has accordingly breached section 67(1).

20. Employees within the bargaining unit, should the employer be allowed to negotiate privately with Touzin and pay him higher wage rates, would clearly perceive their bargaining agent as having limited authority or purpose, and the satisfaction of bargaining unit members with the applicant would be seriously undermined. Such erosion of employee respect for their bargaining agent would be increased by their awareness that an employee, circumventing the union and negotiating directly with his employer, was able to obtain higher wages than the collective agreement provided and than the union could obtain for him.

21. For the above noted reasons we find that the employer has violated both section 64 and 67 of the Act, in its course of conduct in bargaining directly with Touzin with respect to his wage rate, without the consent of the union, and in its attempt to circumvent the provisions of the collective agreement. With respect to remedial relief we make the following declarations or orders:

- a) We declare that Gaetan Touzin is an employee of the respondent, and does not exercise managerial functions so as to exclude him from coverage of the Act pursuant to section 1(3)(b) of the Act;
- b) we direct that Touzin be reinstated to his former position as Class "A" Electrician, a member of the bargaining unit, and that his wage rate be that as contained in the collective agreement for his classification, until such time as he is no longer properly a member of the bargaining unit. Any back union dues with respect to Touzin owed to the union by the

company are to be remitted forthwith, together with interest, to the applicant, as if Touzin were continually within the bargaining unit from his hiring to the date of this decision, or until such time as he is no longer properly a member of the bargaining unit, whichever is earlier.

- c) We are concerned that the remedial relief should address to the extent possible any undercutting or undermining of the union's ability to represent employees in the bargaining unit because of the employer's breach of the Act. We therefore consider it appropriate that employees be apprised of the nature of the breaches of the Act involved. The respondent is accordingly directed to post copies of the attached notice marked "Appendix", after being duly signed by the respondent's General Manager, in conspicuous places where they are likely to come to the attention of employees in the bargaining unit, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced or covered by any other material.

Other than the remedial declarations or orders granted above, no further relief was requested.

22. We remain seized of this matter should there be any problems with respect to the implementation of our directions.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION FULLY PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT IN OUR ATTEMPTS TO PAY GAETAN TOUZIN MORE THAN THE COLLECTIVE AGREEMENT PROVIDED.

THE ACT DOES NOT ALLOW US TO ATTEMPT TO NEGOTIATE OR BARGAIN DIRECTLY WITH AN EMPLOYEE IN THE BARGAINING UNIT, WITH RESPECT TO ANY OF HIS OR HER TERMS AND CONDITIONS OF EMPLOYMENT, NOR DOES IT ALLOW US TO ATTEMPT TO GET AROUND ANY OF THE PROVISION OF THE COLLECTIVE AGREEMENT BY DEALING DIRECTLY WITH INDIVIDUAL EMPLOYEES. WE HAVE BEEN FOUND BY THE ONTARIO LABOUR RELATIONS BOARD TO HAVE DONE BOTH THINGS, AND THIS CONDUCT WAS IN VIOLATION OF THE ACT.

THE UNION IS YOUR EXCLUSIVE BARGAINING AGENT AND WE MUST BARGAIN WITH THEM, AND NOT INDIVIDUAL EMPLOYEES, WITH RESPECT TO TERMS AND CONDITIONS OF EMPLOYMENT, AND WE ASSURE ALL EMPLOYEES THAT WE WILL DO SO.

REXWOOD PRODUCTS LIMITED

PER: _____
(AUTHORIZED SIGNATURE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2795-84-U United Steelworkers of America, Complainant, v. Shaw-Almex Industries Limited, Respondent, v. Group of Employees, Interveners

Reconsideration - Remedies - Stay of Board order and reconsideration requested - Stay academic - Remedial order amended to prevent one party from determining back to work protocol - Request for reconsideration on other grounds dismissed

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *R. J. Gallivan* and *J. Kennedy*.

DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN, AND BOARD MEMBER J. KENNEDY; February 16, 1987

1. Counsel for the respondent applies for reconsideration of the Board's decision of December 22, 1986, [1986] OLRB Rep. Dec. 1800, and also seeks a stay of the Board's order until we determine whether to grant the request for reconsideration.

2. We have not stayed or suspended the remedial order we issued pending the reconsideration request. Before making any determination with respect to the request for a stay, we invited submissions from the other parties. Since the amount of time necessary to receive and consider those submissions extended beyond the date for the meeting set out in our remedial order, the stay request became academic and we therefore did not consider it further.

3. The request for reconsideration is based on many grounds that allege errors in law, jurisdiction and in the Board's understanding of the evidence. Additionally, counsel submitted that the Board's order directing compensation until the earlier of the time the striking employees ceased being employees on strike or the date a return to work protocol is agreed to permits the complainant, in effect, to dictate the terms of the return to work protocol.

4. Counsel also alleged that "... a meeting of vice-chairmen of the Board was convened late in the month of October or early November, 1986 for the purpose of considering the decision to be rendered in this case." Counsel then submitted:

"...it is drawn to the attention of the Board that I, as counsel in this case, drew the attention of the panel to matters proceeding before the Courts of Ontario involving a decision of the Board in Consolidated-Bathurst Packaging Limited and International Woodworkers of America. I refreshed the learned Vice-Chairman's memory with respect to the circumstances of that case and asked for assurance that this case be dealt with only by the panel before which the evidence was being adduced and heard. Although the Ontario Court of Appeal has upheld the actions of the Ontario Labour Relations Board in the *Consolidated Bathurst* case, leave to appeal from that application was heard by the Supreme Court of Canada on Monday, the 8th day of December, 1986 and although the Supreme Court of Canada has not yet granted its leave for the hearing of an appeal, we take the position that any meeting of Vice-Chairmen which heard matters relating to the instant decision was wrong in law and in violation of the principle of 'audi alteram partem'."

5. We note here that although counsel states that he asked for an assurance, counsel does not submit that such an assurance was given. In any event, while the Vice-Chairman of this panel did discuss a draft of the decision in this matter with the Chairman of the Board and other Vice-Chairmen of the Board, the decision that was issued was made by the Vice-Chairman and the two Board Members that heard the evidence. No other vice-chairman or board member presented evidence or made factual assertions to any member of the panel that heard the evidence of the parties. The panel hearing the case relied exclusively on the evidence that was presented at the hearing to reach the conclusions we reached. In our deliberations and in the writing of our decisions we

conducted ourselves in the manner described by Mr. Justice Osler in his dissenting opinion in the *Consolidated-Bathurst* case that was adopted by the Ontario Court of Appeal.

6. We do not accept that we erred in the way submitted by counsel. We each made our respective decisions based on the evidence and our understanding of the relevant labour relations and legal principles.

7. While we are not inclined to reconsider any of our findings, the argument of counsel that our award of damages based on the later of employees ceasing to be employees on strike or the date a return to work protocol is agreed to gives to the applicant the right to determine the return to work protocol is compelling. It was not our intention to have only one party determine the return to work protocol, but rather we wanted to leave it to both parties to negotiate and agree upon a return to work protocol. Therefore, we hereby reconsider our remedial order by deleting item (b) in paragraph 73 and replacing it with:

(b) the date the respondent presents to the complainant a return to work protocol that does not discriminate between the employees hired after the commencement of the strike and the striking employees.

8. Counsel for the respondent also submitted that the Board indicated to the parties that the Board would remain seized with determining the appropriate remedy and not damages only. Counsel has reproduced his notes of the exchange among counsel and the Board. His notes are consistent with our recollection of the exchange. The relevant portion of the exchange set out in counsel's notes is:

Gordon: Mr. Chairman, just before we adjourned, I gave the Board an undertaking from which I would like to be relieved. It has to do with the Board remaining seized of this matter.

Freedman: With respect to damages?

Gordon: Yes. I would wish not to agree that you remain seized on second thought.

Freedman: Assuming we are prepared to say that's fine, what's to stop the Board on its own motion to say that in this type of case, why shouldn't the Board remain seized?

Gordon: To be blunt, my friend has closed his case in chief and adduced no evidence on the subject.

Freedman: That's rather blunt. The name of the case, it escaped me, that dealt with the matter where there was a claim by party of insufficient evidence. The Board wouldn't go ahead whether the Board remained seized or not. The Board is content to allow you to withdraw your undertaking, however, the Board will remain seized of the matter. Even if Mr. Shell had proceeded to adduce evidence, we would have remained seized of it.

Gordon: I had not obtained instructions on this. I thank you, I'm fine now.

Freedman: All right, the Board will remain seized on the matter for damages notwithstanding the employer's lack of approval.

9. It was our intention at the time, and it is, in our view, clear from the exchange, that the Board was remaining seized with the issue of determining the quantum of damages, if it became necessary to do so. We did not suggest that we would remain seized with determining the appropriate remedy. We observe here that the question that counsel for the respondent wished to ask

that went to the issue of remedy and which prompted the exchange set out above and to which counsel for the complainant objected was withdrawn. The Board did *not* rule on whether that question or questions along that line were relevant.

10. Therefore, the request for reconsideration is hereby dismissed save to the extent referred to in paragraph 6 above.

DECISION OF BOARD MEMBER R. J. GALLIVAN;

1. For reasons similar to those which led me to dissent from the majority's decision of December 22, 1986 in this case, I disagree.

2. I continue to believe that in reaching the conclusions which it did in its December 22, 1986 decision, the majority erred in law, misconstrued or ignored the evidence of the respondent's witness Jonathon Shaw, and failed to observe principles of natural justice. I thus would grant the request for reconsideration without limiting it only to item (b) in paragraph 73 of the earlier decision.

3. If the majority would reconsider its decision as I believe it should, and come to the correct decision on the law and on the evidence, the issue of the Board remaining seized on remedy and damages would not arise.

2629-86-R International Union of Operating Engineers Local 796, Applicant, v. **The Municipality of Metropolitan Toronto**, Respondent, v. Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43, Intervener

Bargaining Unit - Certification - Craft unit of stationary engineers ceasing to exist when employees absorbed into broader CUPE bargaining unit - IUOE seeking to carve out historical craft unit of stationary engineers formerly represented by CUOE - Carve out not permitted - Application dismissed

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

APPEARANCES: *Susan Ursel* and *Mike Cameron* for the applicant; *H. W. O. Doyle* and *Harold Ball* for the respondent and *L. A. Richmond* and *J. Mele* for the intervener.

DECISION OF THE BOARD; January 29, 1987

I

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. For ease of exposition, the parties will be referred to, in abbreviated fashion, as follows:

The International Union of Operating Engineers Local 796 will be referred to as “The I.U.O.E.”; The Municipality of Metropolitan Toronto will be referred to as “Metro”; and, the intervener, Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43 will be referred to either as “C.U.P.E.” or “C.U.P.E. Local 43”.

4. Pursuant to section 6(3) of the Act, the I.U.O.E. seeks a “*craft*” bargaining unit framed as follows:

All employees of the respondent employed at the main sewage treatment plant at 1091 Eastern Avenue, Toronto, as stationary engineers, helpers and trainees, save and except the superintendent

Section 6(3) provides:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, *but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.*

[emphasis added]

Metro and C.U.P.E. both oppose the application. They urge the Board not to “sever” or “carve out” approximately a dozen stationary engineers from the established C.U.P.E. Local 43 bargaining unit, which, we were told, encompasses some twenty-eight hundred employees, including quite a number of skilled tradesmen. The I.U.O.E. replies that “craft severance” is not an accurate characterization of its objective. It merely seeks to “reconstitute” a craft unit which was, until recently, represented by the Canadian Union of Operating Engineers (“C.U.O.E.”).

5. The facts are not in dispute. Some of the background was reviewed in a Board decision dated October 9, 1986, in File No. 2389-85-JD, [1986] OLRB Rep. Oct. 1448. The parties do not contest that panel’s findings. The rest of the factual material was put before this panel of the Board, on the agreement of counsel, at a hearing on January 16, 1987.

II

6. In 1960, the Canadian Union of Operating Engineers (“C.U.O.E.”), was certified to represent a “craft” bargaining unit consisting of stationary engineers and their helpers in the employ of Metro. At the time, there were quite a few of them working in several locations and Metro facilities. However, over the years, their numbers dwindled, as old boilers and steam generation equipment were replaced by more modern heating systems which did not require the attention of provincially licensed stationary engineers. Eventually, the complement of stationary engineers shrunk to a small group working at Metro’s sewage treatment plant at 1091 Eastern Avenue. Finally, in 1979, changes in both the equipment and licensing requirements for the sewage treatment plant, all but eliminated the need for qualified stationary engineers at that location as well. For practical purposes, the “craft unit” ceased to exist and the employees were absorbed into the broader C.U.P.E. bargaining unit.

7. It is not disputed that between 1979 and 1985 C.U.P.E. has purported to represent the stationary engineers who are the subject of this application, nor is the quality of that representa-

tion being challenged. All of the subject employees are eligible to participate, fully, in the affairs of Local 43. There is no discrimination or favouritism. They have the same rights as any other member of the Local. Their terms and conditions of employment are established by the Local 43 Agreement which includes, *inter alia*, provisions giving them full seniority rights, pension benefits, access to sick pay, etc. Those provisions have been applied in the same manner and to the same degree as to other bargaining unit members. The stationary engineers have access to the grievance procedure, and C.U.P.E. has processed a number of grievances on their behalf. They are among the higher paid members of the Local 43 unit.

8. The ambiguous position of the C.U.O.E. after 1979 was considered, at length, in the Board decision mentioned above. It was styled as a "jurisdictional dispute" but was triggered by the apparent disappearance of the C.U.O.E.'s "craft" bargaining unit and/or, an abandonment of the C.U.O.E.'s bargaining rights in respect of that unit and the merger of the employees into the broader C.U.P.E. unit. After 1979 union dues continued to be remitted for a period of time, but after 1980 the C.U.O.E. did not take an active interest in, nor purport to represent, the stationary engineers working on equipment or performing functions which, by then, did not require their formal qualifications. They were treated by Metro and C.U.P.E. as part of the latter's unit; and, for several years neither the employees nor the C.U.O.E. raised any concern.

9. In a decision dated October 9, 1986, the Board concluded that the C.U.O.E. had abandoned its bargaining rights. Accordingly, it was beyond doubt that in law as well as in fact, the employees had become part of the C.U.P.E. bargaining unit and covered by the C.U.P.E. collective agreement. (We might note parenthetically that there are, in fact, classifications in those agreements pertaining to the jobs the subject employees are performing. We should also observe that if the employees had not been treated as part of the C.U.P.E. unit they would have had no clearly protected right to job opportunities in that unit and might have faced layoff).

10. The technical situation at the sewage treatment plant altered once more in 1985. Changes to the system and a re-designation of the plant under the regulations, created a need, once again, for a small number of employees with stationary engineers' licences. We should note, however, that the I.U.O.E. does not seek to represent *all* of the licensed stationary engineers working in the sewage treatment plant. For the purposes of this application, the I.U.O.E. only seeks to represent those stationary engineers engaged in steam *generation* and what it claims to be related functions. The union wishes to exclude certain other licensed stationary engineers working with equipment or processes *using* steam, but not directly engaged in steam *generation*. The applicant union explained that the heat treatment process-albeit involving licensed stationary engineers - did not exist prior to 1979, and is not part of the historical employee grouping of stationary engineers represented by a craft union. The I.U.O.E. only seeks to represent the "historical unit" formerly represented by the C.U.O.E. That is why the I.U.O.E. claims that the traditional craft bargaining unit has been "reconstituted".

11. We heard much interesting detail about the design and functioning of the Eastern Avenue sewage treatment plant. We do not think it is necessary to record that detail here. Of more interest are the characteristics of the employee complement working at the plant.

12. As we have already mentioned, the Local 43 bargaining unit encompasses approximately twenty-eight hundred employees. Approximately two hundred and eighty-three of them work at the Eastern Avenue sewage treatment plant. About one hundred and ten work as "operators" of various classes, and some one hundred and seventy-three employees are engaged in maintenance functions. Fifteen supervisory, laboratory, office or "stores" employees are members of C.U.P.E. Local 79.

13. There is no doubt that the sewage treatment plant is a fully integrated operation. The employees are required to work in co-operation with, and proximity to one another. The stationary engineers are not isolated geographically, functionally, or administratively, and if one considers such factors as the nature of the work performed, the conditions of employment, the skills of the employees, the ease of administration, proximity to other workers, and functional coherence or independence, we could not find that the stationary engineers, whom the I.U.O.E. here seeks to represent, have a separate community of collective bargaining interest. Nor do economic factors, the structure of managerial authority, or the source of work dictate a separate bargaining unit.

14. The possession of trade skills or provincial qualifications is not unique in the C.U.P.E. Local 43 bargaining unit as a whole, or at the Eastern Avenue sewage treatment plant. At the plant, the maintenance group includes quite a number of tradesmen with provincial certificates of qualification (mill wrights, fitters, welders, machinists, etc.), as well as "technicians" of various kinds who require considerable amounts of post secondary training. There are many other provincially certified tradesmen in the C.U.P.E. Local 43 bargaining unit (who, as might be expected, work in classifications at the "high end" of the wage scale) and some of those workers are more highly skilled/trained than the stationary engineers. While we do not doubt the skills or abilities of the individuals whom the I.U.O.E. seeks to represent their situation is not unique. It is not at all unusual for an "industrial bargaining unit" to number among its members employees with equal or greater qualifications. But that does not mean that each of these groupings of skilled employees is entitled to a separate unit for collective bargaining purposes. Indeed, were it not for the I.U.O.E.'s reliance on section 6(3), and the prior history of "craft representation" by the C.U.O.E., this application would be summarily dismissed, because the unit sought does not constitute an appropriate bargaining unit.

III

15. Outside the construction industry, craft bargaining units are exceptional both in practice, and as a deliberate matter of legislative policy. That policy was recently reviewed in *Kidd Creek Mines* [1984] OLRB Rep. March 481, where the Board commented:

54. Section 6(3) is an exception to section 6(1) and does have deep historical roots. Its origins can be traced to federal wartime collective bargaining regulations which, in turn, borrowed heavily from American experience in the 1930's. In both cases, the legal framework sought to accommodate the diverse interests of a labour movement which, at the time, was deeply divided. Traditional craft unions found themselves in fierce competition with aggressive new industrial unions bent on organizing workers in the mass production industries. These new unions rejected the notion of craft exclusivity and sought to organize employees on a broader industrial basis, regardless of whether they were skilled or unskilled.

55. By the late 1930's, craft and industrial unions had split into rival federations, each espousing its own preferred model of organization. When the process of organizing became the subject of state regulation, craft unions demanded recognition of their historical role and legal protection for the special interests which they feared would be submerged without it. Craft employees were primarily interested in the preservation and advancement of their craft. In their view, this could only be achieved by bargaining separately, rather than as a minority in a much larger bargaining unit comprising both skilled and unskilled employees. The result of their lobbying was the predecessor of section 6(3) (see generally: J.A. Willes, *The Craft Bargaining Unit: Ontario and U.S. Labour Board Experience*, Industrial Relations Centre, Queen's University, 1970).

56. Legislative protection for craft bargaining units was initially based upon the bargaining structures and rivalries of the 1930's and 1940's and after the war similar provisions crept into provincial legislation. However, requirements such as section 6(3) are now relatively uncommon. Because of problems associated with the proliferation of bargaining units in industrial enterprises, federal policy has now shifted away from craft units. In fact, the trend is in the opposite

direction. It has been recognized that in a modern industrial context craft units will generally be inappropriate. Following the recommendations of the Woods Task Force in 1968, federal legislation was amended to delete the provisions protecting craft bargaining units, and the circumstances in which an existing unit will be splintered are now closely confined (see *Feed-Wright Ltd.*, [1979] 1 Can. L.R.B.R. 296; *Atomic Energy of Canada Ltd.*, [1978] 1 Can. L.R.B.R. 92; and *Cablevision Nationale Ltee*, [1979] 3 Can. L.R.B.R. 267 and cases referred to therein). In British Columbia craft units will be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in manufacturing. As we have already noted, while this case was being litigated the British Columbia Labour Relations Board was considering whether to merge an I.B.E.W. bargaining unit at MacMillan-Blodell into an existing industrial bargaining unit, thereby eliminating alleged industrial relations instability. Thus, while section 6(3) has deep historical roots, it is now something of a historical anomaly.

57. Nor are the protections offered by section 6(3) absolute. An examination of the statutory language indicates that it has been carefully drafted to preserve the status quo. It is a recognition of historical organizing patterns, rather than any general endorsement of craft bargaining units. Those historical criteria are built right into the section itself, and must be satisfied before it has any application. Section 6(3) is available only *if* the group of employees whom the union seeks to represent *already commonly* bargain separately and apart from other employees; and only *if* the applicant trade union has traditionally represented employees with those skills. Both conditions require the Board to look to the collective bargaining system for historical precedent to establish that the separate bargaining is already "common", and that the union's representation of these employees is in accordance with "established practice". These conditions effectively preclude the development of new craft unions and, in our view, limit the extension of craft bargaining patterns beyond their traditional boundaries. *It is also interesting to note that even if these criteria are met, the section need not be applied where the union seeks to "carve out" a craft group from an existing bargaining unit. This latter qualification is legislative recognition of the bargaining problems which might result from multiplying the number of bargaining units in an industrial enterprise; and whether fragmentation arises because the system grows in a piecemeal fashion or is subsequently carved up, the industrial relations problems are the same.*

16. What are the collective bargaining problems mentioned in *Kidd Creek*? The reason for the concern about fragmentation and the desire to promote broader bargaining units is explained in *Bestview Holdings* [1983] OLRB Rep. Aug.1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patch work quilt of bargaining units is a recipe for industrial unrest - if only because, in an integrated enterprise, it takes only one collective bargaining breakdown to start the whole system unravelling. Thus, in *Kidd Creek* the Board was not inclined to (and eventually did not) accept a bargaining unit of one hundred maintenance electricians, working in a maintenance department of eight hundred tradesmen and a mine which employed, in total more than two thousand employees. The concerns of the employer in that case are quite similar to those expressed here:

53. The employer stresses the statutory objective of orderly collective bargaining which, it argues, requires a bargaining unit structure which will minimize industrial conflict. In the employer's submission, fragmentation of its work force would create artificial barriers inhibiting cross-trades training, promotion, flexible work practices, and the introduction of necessary technological change. With an integrated work force of employees working in co-operation with one another, it makes no sense to treat one trade as if it were a watertight compartment, or to ignore the real problems - jurisdictional disputes, picketing problems, strike-induced layoffs, etc. - which would inevitably follow the creation of an island of collective bargaining in a sea of employees with overlapping or functionally related skills. The employer asserts that craft unions and units are obsolete in a modern industrial society, and "as proof of the pudding" points to the evidence in this case which was replete with examples of common bargaining with other skilled and unskilled employees, and diluted craft bargaining units. In the employer's submission, section 6(3) is a historical anomaly and an exception to section 6(1) which should be strictly construed. The employer argues that harmonious employer - employee relations demand it. In the employer's submission, the Board should not establish a unit which is inappropriate for collective bargaining if a plausible interpretation of section 6(3) will avoid that result, nor should it lightly extend balkanized bargaining structures beyond those industries in which they have historically existed.

(See also *Ryerson Polytechnical Institute* [1984] OLRB Rep. Feb.371, *Board of Education for the City of Toronto* [1986] OLRB Rep. June 900, and *Insurance Corporation of British Columbia* [1974] 1 CLRBR 403 (B.C.)).

17. Those concerns underlie the Board's reluctance to sever a craft unit from an established industrial one. In the years following the 1960 amendment making such "carve-outs" discretionary, the Board routinely refused applications by the I.U.O.E. or the C.U.O.E. to "carve out" a craft bargaining unit of stationary engineers (see for example *Religious Hospitallers of Saint Joseph's (Cornwall)* [1961] OLRB Rep. Jan.370; *Darling and Company of Canada, Limited* [1961] OLRB Rep. Nov. 273; *Fairhaven Home for the Aged* [1961] OLRB Rep. Jan.359; *American Standard Product (Canada) Ltd.* [1962] OLRB Rep. Jan. 348; *Dominion Fabrics Limited* [1962] OLRB Rep. Jan. 347; *Maxwell Limited* [1961] OLRB Rep. Dec. 323; *Cluett Peabody and Company of Canada Limited* [1961] OLRB Rep. Dec. 314; and *Automatic Electric* [1961] OLRB Rep. Nov. 272.) In the *Fairhaven* case the stationary engineers had been part of a composite unit represented by NUPSE (a predecessor of C.U.P.E.) for only a year, but the Board still refused to grant a craft carve out.

18. In determining whether to exercise its discretion in favour of an applicant's request to carve out a craft unit, the Board has considered a variety of factors, including: the history of representation by the industrial union; whether there has been a consecutive chain of collective agreements; whether such collective agreements adequately accommodate or, conversely, discriminate against the skilled employees in respect of wages or seniority rights; whether the skilled group has adequate access to shop stewards, union committees, or officials; whether there has been a proper presentation of grievances, and so on (see generally the summary and cases referred to in J. Sack and C. M. Mitchell *Ontario Labour Relations Board Law And Practice* 1985 Butterworths at pages 173-175). Here, in our view, none of those factors point very strongly in favour of carving out the proposed bargaining unit, and the policy considerations mentioned above, point strongly in the opposite direction. Indeed, while the I.U.O.E. seeks to rely upon the previous presence of a craft bargaining unit represented by the C.U.O.E., that history reveals the fragility and instability of a craft unit which contracted and, for a time disappeared altogether, with the vagaries of government regulation and technological change. And how did the problem crystalize before the Board? As a jurisdictional dispute in which the C.U.O.E. claimed certain work which Metro had assigned to members of the C.U.P.E. bargaining unit. That is precisely the kind of problem which the Legislature sought to avoid when it authorized the Board to refuse a craft severance. The applicant here even wants to limit the number of stationary engineers in the bargaining unit it seeks to represent.

19. In our opinion it makes no collective bargaining sense to re-create a tiny island of collective bargaining comprising only part of Metro's complement of stationary engineers working at the Eastern Avenue sewage treatment plant. There are good collective bargaining policy reasons not to accept the proposed unit and in the absence of clear and compelling evidence of inadequate representation we decline to do so. In the exercise of our discretion under section 6(3) we are not prepared to permit the carve out of the proposed craft unit.

20. For the foregoing reasons, this application is dismissed.

1713-85-M Paul H. Tremblay, Applicant v. Ontario Public Service Employees Union, Respondent Trade Union, v. Georgian College of Applied Arts & Technology, Respondent Employer, v. Attorney General of Ontario, Intervener

Religious Exemption - Roman Catholic community college teaching master requesting exemption from union dues because OFL involved in pro-choice abortion activities - Applicant's union an affiliate of OFL - Actions of OFL too remote to found a religious objection to paying dues to OPSEU - Application dismissed

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *A. Grant* and *L. Collins*.

APPEARANCES: *Paul H. Tremblay* for the applicant; *Paul Cavalluzzo* for the respondent trade union; *David Lepofsky* and *Chris Dobson* for the intervener; no one appearing for the respondent employer.

DECISION OF THE BOARD; February 16, 1987

1. This is an application by Paul H. Tremblay under section 53 of the *Colleges Collective Bargaining Act* (also referred to in this decision as the "Act", for ease of reference) for exemption on the grounds of religious conviction or belief from the union security provisions in a collective agreement entered into between the respondent trade union (also referred to in this decision as "OPSEU" and the "Union") and the respondent employer (also referred to in this decision as "Georgian College").

2. Section 53 of the Act provides:

(1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.

(2) Where the Ontario Labour Relations Board is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Ontario Labour Relations Board shall order that the provisions of the agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the *Income Tax Act* (Canada) as may be designated by the Ontario Labour Relations Board.

(3) No agreement shall contain a provision which would require, as a condition of employment, membership in the employee organization.

3. Mr. Tremblay also contends that he has been dealt with by OPSEU contrary to section 76 of the Act, which provides:

An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

That provision is substantially similar to section 68 of the *Labour Relations Act*. Although section 68 refers specifically to representation of employees "in a bargaining unit", and section 76 of the *Colleges Collective Bargaining Act* does not, that limitation is implicit in section 76 in view of section 1(f) of the *Colleges Collective Bargaining Act*, which defines "employee" as "a person employed by a Board of Governors of a college of applied arts and technology in a position or classification that is within the academic bargaining unit or the support staff bargaining unit..." In the context of section 68 of the *Labour Relations Act*, it has been consistently held that for the Board to find a breach of the duty imposed by that provision, the union's impugned actions must involve the representation of a bargaining unit employee in relation to his or her employer: see, for example *Ronald Lewszoniuk*, [1984] OLRB Rep. Jan. 48; *Angelo Moro*, [1983] OLRB Rep. August 1354; *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; and *Frank Manoni*, [1981] OLRB Rep. Dec. 1775. Similar considerations apply to section 76 of the *Colleges Collective Bargaining Act*. None of the matters which form the basis of Mr. Tremblay's complaints against the Union in the instant case involves his representation by the Union in relation to his employer. Accordingly, having regard to the totality of the evidence and the submissions of the parties, we find that no contravention of that provision has been established in these proceedings.

4. Counsel for the Union notified the Attorney General of Ontario and the Attorney General of Canada that it was OPSEU's intention to question the constitutional validity of section 53(2) of the Act, on the basis that it contravenes sections 2 and 15 of the *Constitution Act*, 1982. In response to that notice, the Attorney General of Ontario intervened in these proceedings and presented, through counsel from the Ministry of the Attorney General, submissions in support of the constitutional validity of section 53(2) of the Act. At the outset of his able argument on behalf of the Attorney General, Mr. Lepofsky advised the Board that his submissions would be confined to the constitutional issue, and that he would not be taking any position concerning the merits of the application.

5. In an earlier application under section 53 of the Act (File No. 1564-83-M), Mr. Tremblay sought an exemption from that portion of his Union dues attributable to the following resolution ("Resolution 41"), which was passed at the OPSEU Convention in August of 1983:

WHEREAS it should be the fundamental right of each woman to chose when and if she will bear children; and

WHEREAS present Criminal Code restrictions affect the legality and availability of abortions, and highly organized campaigns are underway to further limit the right to choose; and

WHEREAS there is not a safe and effective method of birth control for each woman;

BE IT RESOLVED that OPSEU endorse a woman's freedom of choice by supporting the right of women to full access to abortion;

BE IT FURTHER RESOLVED that OPSEU demand the removal of abortion from the Criminal Code;

BE IT FURTHER RESOLVED that OPSEU demand that free-standing medical clinics providing abortions fully covered by OHIP be established;

BE IT FURTHER RESOLVED that the Equal Opportunities Co-ordinator prepare a series of three columns for OPSEU News which will explain the problems women face in obtaining a safe, legal abortion; and the reasons why it is important for the trade union movement to take a public stand on this issue.

That application was heard and decided by another panel of the Board (the "Mitchnick panel"). In a unanimous decision dated February 13, 1984 (reported in [1984] OLRB Rep.Feb. 247, and 6 CLRBR (NS) 289), that panel found the application to be premature, and dismissed it without prejudice to Mr. Tremblay's right to re-file if warranted by further developments. In doing so, the panel wrote, in part, as follows:

17. Mr. Tremblay has ... conceded that accommodation of the freedom of speech of other members of the union ought to permit those members to express themselves in the manner they wish, and he has effectively dropped his complaints in that regard. Even the publication of articles in the OPSEU Newsletter, he ultimately conceded, could not be cause for complaint, so long as they essentially endeavour to present a *balanced* sampling of opinions, and thus are written solely from an educational point of view. Mr. Tremblay's complaint, therefore, has been reduced to the specific expenditure of funds, to which he has contributed through his dues, for purposes fundamentally inconsistent with his religious beliefs.

18. What are the expenditures about which Mr. Tremblay has expressed concern? He points, firstly, to the costs of the annual convention attributable to debate on the "abortion" resolution. But that debate, it seems to us, would fall within the "freedom of speech" area already conceded by the applicant, notwithstanding that that debate fell within the "business" portion of the convention. His complaint, therefore, must be with the adoption of the Resolution itself. And it is only the final paragraph of that Resolution to which Mr. Tremblay, for the purposes of his request for apportionment, has ultimately taken exception: it is only that paragraph which can be said to contemplate an actual expenditure of funds, and which therefore crosses the line that Mr. Tremblay, after struggling to reconcile the freedoms of others with his own, has drawn in his mind. And that is what makes of significance the evidence of the respondent, through Ms. Lankin, as to the present status of the articles authorized to be written. It is the evidence of Ms. Lankin (and we accept that evidence) that neither time nor funds have yet been expended on the proposed articles, because she and the persons to whom she reports at OPSEU have not yet decided what format these articles will take, or how the various views on the subject are to be presented. In light of this, it cannot fairly be said that the line which Mr. Tremblay himself has drawn has yet been crossed.

19. It follows, therefore, that the specific application before us is premature, and must be dismissed, without prejudice, obviously, to Mr. Tremblay's right to re-file should further developments warrant.

6. The applicant has been a Teaching Master at Georgian College since September of 1974. He is a devout Roman Catholic and has been a Simcoe Board of Education trustee representing separate school supporters since 1979. He subscribes to the religious views contained in a pamphlet entitled "Vatican Declaration on Abortion" (which was entered as an exhibit in these proceedings). It is his belief that human life is sacred and that it begins at the time of conception. He is also of the view, on the basis of his religious beliefs, that abortion should not be a matter of choice, as he believes that it involves "execution of an innocent human being". It is clear from the totality of the evidence that, as ultimately conceded by the Union in these proceedings, Mr. Tremblay's beliefs concerning abortion are sincerely held and form part of his religious beliefs. It is, of course, neither necessary nor appropriate for the Board to express any opinion concerning the validity of those beliefs, or to otherwise enter into the "pro-choice" or "pro-life" debate, as the matter of whether the members of this panel of the Board individually or collectively take the same or a different view of the matter is irrelevant.

7. Mr. Tremblay was a strong supporter of the Union and took an active role in its affairs by serving as a steward before the events described in this decision prompted him to resign from the Union and to file the instant application. During the hearing of the present case, Mr. Tremblay suggested that the decision of the Mitchnick panel was incorrect in finding (at paragraph 17 of their decision) that he had "conceded that accommodation of the freedom of speech of other members of the Union ought to permit those members to express themselves in the manner they wish", that he had "effectively dropped his complaints in that regard", and that his complaint had "been reduced to the specific expenditure of funds, to which he has contributed through his dues, for purposes fundamentally inconsistent with his religious beliefs." However, as we indicated to Mr. Tremblay at the hearing of this matter, this complaint is not an appeal or application for reconsideration of that earlier decision. In the absence of a successful application for reconsideration or judicial review of that decision, all of the parties to that case, including Mr. Tremblay, are bound by that decision and will not be permitted to use the present case to relitigate the factual findings and legal conclusions on which it is based.

8. Thus, the sole issue that is properly before us for adjudication in respect of Resolution 41 is the question of whether there has been an actual expenditure of funds pursuant to that resolution. In that regard, we accept the credible, uncontradicted evidence of Maxine Jones, who is a local vice-president of OPSEU Local 138 and a member of the Union's Provincial Executive Board, that no monies have been spent by the Union as a result of that resolution, and that no articles of the type contemplated by that resolution have been written. It is also clear from Ms. Jones's testimony that OPSEU has not made any representations to any level of government concerning the removal of abortion from the Criminal Code or the establishment of free-standing medical clinics providing abortions.

9. After becoming aware that Resolution 41 had been adopted at the 1983 OPSEU Convention, Mr. Tremblay filed charges under OPSEU's Constitution against Ms. Jones, who was the chairperson of the Resolutions Committee for the 1983 convention, and Sean O'Flynn, who was the President of OPSEU at that time. The arbitration board that was constituted to hear those charges found that Mr. O'Flynn and Ms. Jones had committed no offence and, therefore, dismissed Mr. Tremblay's charges against them. However, the arbitration board went on to determine that it was within their authority "to make recommendations that could resolve the issue before [them]". Those recommendations were that Mr. O'Flynn should ensure that another resolution concerning the issue of abortion (Resolution 51) would be the first item of business at the OPSEU Convention in November of 1984, and that Mr. O'Flynn should arrange for a general membership meeting to be held concerning that matter prior to the convention. Mr. O'Flynn and Ms. Jones exercised their rights under Article 22 of the OPSEU Constitution to appeal that arbitration board decision to the Executive Board. That appeal resulted in the arbitration board decision (including the aforementioned recommendations) being quashed by the Executive Board on June 22, 1984. The following reasons for the Executive Board's decision are recorded in the minutes of that meeting:

THE DECISION OF THE ARBITRATION BOARD INCLUDING ITS RECOMMENDATIONS ARE QUASHED.

THE EXECUTIVE BOARD NOTES THAT THE ARBITRATION BOARD EXCEEDED ITS JURISDICTION WHEN HAVING DISMISSED THE CHARGES, THEN [sic] DETERMINED: "IT IS ALSO WITHIN THE AUTHORITY OF THE (ARBITRATION) BOARD TO MAKE RECOMMENDATIONS THAT COULD RESOLVE THE ISSUE BEFORE THE BOARD."

THE ARBITRATION BOARD DECISION IS IN BREACH OF UNION POLICY AND THE CONSTITUTION IN THAT IF IMPLEMENTED:

- A) WOULD CAUSE THE PRESIDENT OF OPSEU TO BREACH UNION POLICY AND THE CONSTITUTION IN CARRYING OUT THE DIRECTION IN ITEM ONE OF THE BOARD DECISION;
- B) WOULD SEND A RESOLUTION TO CONVENTION WITHOUT GOING THROUGH THE CORRECT PROCEDURE, FORCING THE RESOLUTION ONTO THE AGENDA AND ON THE CONVENTION FLOOR, SETTING THE PRIORITY FOR THE RESOLUTION ON THE AGENDA CONTRARY TO THE CORRECT PROCEDURES AND CONSTITUTIONAL DIRECTIVES;
- C) WOULD PREVENT THE IMPLEMENTATION OF A RESOLUTION PASSED BY CONVENTION.

(The Minutes also indicate that Mr. O'Flynn and Ms. Jones did not vote on the decision and were not present during the *in camera* session.) The Executive Board also overturned the arbitration board's decision that "the costs be borne by OPSEU Head Office", and directed that the costs of the appeal for both parties be borne by OPSEU Head Office, that the arbitration costs of the accused and their counsel be borne by OPSEU Head Office, and that the arbitration costs of the accuser and his counsel be borne by Mr. Tremblay. The total costs borne by OPSEU Head Office as a result of that direction were approximately \$15,000.

10. Mr. Tremblay submitted in the instant case that all of the costs borne by OPSEU Head Office concerning those arbitration and appeal proceedings constituted Union expenditures pertaining to "the abortion issue", and that those expenditures should entitle him to an exemption under section 53 of the Act. However, we find that position to be untenable. All of those costs were incurred by OPSEU as a direct result of arbitration proceedings initiated by Mr. Tremblay himself, through the laying of the aforementioned charges. Having initiated internal Union proceedings which would quite predictably give rise to costs of the type incurred by the Union, Mr. Tremblay cannot legitimately rely upon those expenditures as a basis for obtaining an exemption from payment of Union dues. If the expenditure of funds by the Union for the purpose of paying for the costs generated by such proceedings were in fact fundamentally inconsistent with Mr. Tremblay's religious beliefs, then presumably he could not, in good conscience, have initiated such proceedings. Having regard to all of the evidence, we are not satisfied that there exists a sufficient causal connection between Mr. Tremblay's religious beliefs and his purported objection to those Union expenditures to entitle him to a religious objection under section 53 on the basis of those expenditures.

11. However, the matter does not end there. The primary thrust of this application by Mr. Tremblay is that he should be granted relief under section 53 in view of the fact that in September of 1984 the Ontario Federation of Labour (the "OFL"), of which OPSEU is an affiliate, donated \$3,000 to the Ontario Coalition of Abortion Clinics (the "OCAC"), a "pro-choice" organization which advocates free-standing abortion clinics. He also bases his application on the fact that the OFL adopted the following resolution ("Substitute Resolution S2") at its convention in November of 1984:

WHEREAS in January 1984, only one-quarter of Canadian public General Hospitals had therapeutic abortion committees, and of those 18% performed no abortions and 18.2% performed between 1 and 20 abortions each; and

WHEREAS this indicates that Canadian women in need of abortions have inadequate, and in some cases, no access to proper abortion facilities; and

WHEREAS it is already OFL policy to support a woman's right to choose, including repeal of the abortion law and legislation of free-standing clinics; and

WHEREAS Dr. Morgantaler and his colleagues have been acquitted by a jury for the fourth time;

THEREFORE BE IT RESOLVED that the Ontario Federation of Labour -

1. Urge the Attorney-General Roy McMurtry not to appeal the verdict and cease any further prosecution of the doctors;
2. Urge Justice Minister John Crosbie to immediately move to remove abortion from the criminal code;
3. Support the right of the Morgantaler clinic to continue to function without harassment;
4. Urge Health Minister Keith Norton to approve and fund public free-standing clinics providing medically insured abortions;

BE IT FURTHER RESOLVED that the OFL demand of the Ontario government that every public health unit be obliged to set up family planning clinics providing a wide range of gynecological services and counselling. Services must be made available to all, regardless of age, without any requirement for parental consent. In rural areas mobile clinics must be provided on a regular basis.

12. To reduce the time required to complete the hearing of this matter, the parties agreed that the following facts concerning, among other things, the relationship between OPSEU and the OFL, would be taken as having been duly proven through the following paragraphs of an affidavit of James Clancy, the President of OPSEU, which affidavit was prepared for use in proceedings before the Supreme Court of Ontario respecting another case:

24. In November 1979 the OPSEU Convention decided to affiliate the Union with the Canadian Labour of Congress [sic], the Ontario Federation of Labour and the National Union of Provincial Government Employees. This decision brought OPSEU into the mainstream of the Canadian labour movement and enabled it to fulfil the purposes of Article 4 of its Constitution by helping to shape labour's policies on social economic and political matters. The delegates to the 1979 Union convention recognized that the strength of the workers depends on their solidarity and that cooperation with other Unions through various coordinating bodies increases their chances of advancing the well being of all their members. These affiliations were done for these purposes.

25. Affiliation with the central labour bodies just referred to is particularly valid for a public sector union such as OPSEU which deals with governments and government funded agencies and whose collective bargaining rights are uniquely constrained by statutes such as the Crown Employees Collective Bargaining Act. In contrast with many unions in the private sector who can raise any matter they wish at the bargaining table, OPSEU must seek many of its bargaining objectives by lobbying government and when that fails by appealing to the community at large. Since most OPSEU members work for government, the Union inevitably becomes involved in the political process. When government decides for example to close hospitals, or reduce the funding of community colleges or cut back on institutional care for the developmentally handicapped the impact on the Union's members can be devastating. Dealing with issues such as these at the bargaining table is virtually hopeless. The Union is thus forced to enter the political arena to challenge the employer's decisions by appealing to politicians, community leaders, other interest groups and the general public itself. To do this, it needs all the allies it can find and the broader labour movement is a powerful source of help. Such considerations were paramount when the Union decided to join the CLC, the OFL and NUPGE.

26. The technical details of OPSEU's affiliation with these organizations are as follows. OPSEU is chartered [sic] as a component of NUPGE, an umbrella organization grouping government employees in eight provinces. NUPGE is chartered as an affiliate of the CLC. Thus, OPSEU's affiliation with the CLC is through NUPGE, and indirect rather than direct. OPSEU is chartered as an affiliate of the OFL, which is the provincial branch of the CLC.

27. Affiliates pay "per capita" fees to support the work of these central labour bodies. The per capita fees are paid out of the Union dues received by each affiliate from the employees it represents and is [sic] based upon the number of employees represented. For this purpose, OPSEU combines part time employees into "equivalent full time dues payers". OPSEU's per capita payments are currently based on an adjusted figure of 75,000 full time employees represented.

28. OPSEU has a total annual revenue raised from employees it represents of \$19,048,414 for the fiscal year ending June 30, 1985. OPSEU made per capita payments of NUPGE in fiscal 1984 of \$355,200, to the CLC (through NUPGE) in fiscal 1984 of \$381,840 and to the OFL in fiscal 1984 of \$222,000.

29. NUPGE's total revenue for the fiscal year ending February 28, 1985 was approximately \$1,091,521. The CLC's total revenue for the fiscal year ending December 31, 1984 was approximately \$9,910,683. The OFL's total revenue for the fiscal year ending June 30, 1985 was approximately \$1,970,159.

30. The CLC, NUPGE and the OFL are each governed by their conventions and between conventions by their executive councils. OPSEU like all affiliates is entitled to its per capita number of delegates to these conventions. At each of these conventions, OPSEU delegates constitute a small proportion of all delegates. In no sense can it be said that OPSEU delegates control or are responsible for the decisions of these conventions. Between conventions, the executive councils of the organizations direct their course without formal direction of any kind from OPSEU.

Ms. Jones also confirmed the accuracy of the information contained in those and certain other paragraphs of that affidavit.

13. Carrol Anne Sceviour was also called by the Union as a witness in these proceedings. Ms. Sceviour, who is the President of Local 6624 of the United Steelworkers of America, is one of the twenty-one vice-presidents of the OFL. She is also a co-chairperson of its Women's Committee and its Human Rights Committee. In her testimony before the Board, she confirmed the truthfulness of the facts contained in the following paragraphs of an affidavit (also prepared for use in the aforementioned proceedings before the Supreme Court of Ontario) by Clifford G. Pilkey, who was the President of the OFL at the time of the affidavit and at the time of the events described in this decision:

3. The O.F.L. is composed of more than 2,000 affiliated local unions representing approximately 800,000 Ontario workers. The employees represented by the O.F.L. are employed in virtually every area of the Ontario economy, including both the private and public sectors.

4. The decision to affiliate with the O.F.L. is made democratically by employees represented by individual local unions. Upon becoming an affiliate of the O.F.L., a local makes a monthly payment to the O.F.L. calculated on the basis of 25 cents per employee. These payments represent the only source of funding for the O.F.L., save for occasional government grants for the operation of special programs.

5. Affiliated locals which make per capita payments to the O.F.L. do not earmark certain portions for specific expenditures. Rather, affiliated locals make per capita payments to the O.F.L. in order to maintain their membership in good standing, and in return receive the full range of activities and services, described below, provided by the O.F.L. affiliated locals.

6. The goals and objectives of the O.F.L. include promoting the interests of its affiliates; advancing the economic and social welfare of Ontario workers; securing provincial legislation which will safeguard and promote the principle of free collective bargaining, the rights of workers and the security and welfare of all people; protecting and strengthening democratic institutions in order to secure full recognition and enjoyment of the rights and liberties of Canadians; promoting the cause of peace and freedom in the world, and assisting and co-operating with free and democratic labour movements throughout the world to that end.

7. In order to attain these objectives, the O.F.L. engages in various activities and provides a

wide range of services, all of which are intended to safeguard and promote the interests of the 800,000 workers it represents. These services include worker education, research, public relations, and legislative and political action. By providing these services, the O.F.L. spares its affiliates the expense of providing such services on their own, and serves as a central organization through which the interests of affiliated locals can be collectively promoted on a province-wide basis.

8. The specific activities of the O.F.L. include, among other things, the following:

- (a) preparing briefs and making submissions and presentations to various task forces, commissions and boards established by the provincial government;
- (b) organizing and implementing public campaigns to achieve labour's objectives on matters ranging from racism and affirmative action to day care and medicare;
- (c) providing internal education to employees on an ongoing basis, including forums, conferences and publications;
- (d) sponsoring and organizing conferences and seminars on such subjects as universal social insurance, human rights for the disabled, interest rates, day care and race relations;
- (e) direct contact with government officials and agencies;
- (f) support for the New Democratic Party.

9. Officers and staff of the O.F.L. sit as representatives of the labour movement in Ontario on various boards, committees, and commissions which are involved in activities of importance to the working people of Ontario....

10. The O.F.L. has extensive contacts with many other voluntary organizations across Ontario, including major religious, social and economic groups. From time to time, the O.F.L. enters into coalitions with many of these groups around particular issues of concern to its affiliates. Such coalitions have included the Acid Rain Coalition and the Ontario Health Coalition.

11. As is the case with trade union movements in the rest of the free world, the activities of the O.F.L., involve the full range of social and economic matters which touch upon the interests of workers in Ontario. Such activities form part of an integrated program of social and economic action intended to achieve, by democratic means, changes in our society that benefit Ontario workers. Such action is also intended to promote a political and economic atmosphere which will recognize, protect and advance the rights of trade unions and the workers they represent. In this respect, the O.F.L. counterbalances the activities of organized groups of employers such as the Canadian Manufacturers' Association, the Chamber of Commerce, the Canadian Federation of Independent Business, and the Canadian Organization of Small Businesses.

12. The governing body of the O.F.L. is the annual convention, the representation in which is set out in Article 4 of the O.F.L.'s Constitution. The decisions of the convention are by majority vote. Convention delegates from affiliated local unions are ordinarily elected at local union meetings. It is through O.F.L. conventions that affiliated locals set the policy and future direction of the O.F.L.

13. The officers of the O.F.L. are the President, the Secretary-Treasurer, and twenty-one Vice-Presidents, all of whom are elected biannually by majority vote through secret ballot of the convention. The day-to-day operations of the O.F.L. are overseen by the President and Secretary-Treasurer.

14. The Executive Board of the O.F.L. is composed of the President, the Secretary-Treasurer, and the twenty-one Vice-Presidents. The Executive Council is composed of members of the Executive Board and one delegate from each local labour council. The Executive Council is, under the Constitution, the governing body of the O.F.L. between conventions. Members of the

executive board chair the various O.F.L. standing committees that supervise ongoing policy concerns. At present there are nine such committees: education; energy, conservation and pollution control; human rights; occupational health and safety; political education; social services; women; labour relations; and constitution and structure. In addition, special committees are established to deal with particular problems as they arise.

15. Decisions as to the specific activities, programs and expenditures undertaken by the O.F.L. are decided by convention on the basis of majority rule and by duly elected officials acting pursuant to convention resolution and in accordance with the powers vested in them by the O.F.L. Constitution....

18. O.F.L. conventions have for a number of years passed resolutions supporting the right of women to choose whether or not to have an abortion, and endorsing legalization of clinics which provide such services to women. The most recent resolution was passed at the 1984 convention.... In order to carry out the purpose of such resolutions, the O.F.L. contributed \$3,000 to the Ontario Coalition for Abortion Clinics in the fiscal year 1984-85. This money was specifically to be used for funding a staff person for one day per week for a six-month period. It is the belief of the O.F.L. that securing the right of women to choose whether or not to have an abortion, will improve the health and the social and economic status of women workers in Ontario.

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21. It is the belief of the O.F.L. that the activities, programs and expenditures, outlined above, benefit and contribute to the social and economic well-being of the workers it represents. In this respect, they are equally important as, and in some cases more effective than, negotiations with individual employers.

14. The aforementioned \$3,000 donation resulted from a deputation made to the Women's Committee on September 10, 1984 by Judy Rebeck of the OCAC. After Ms. Rebeck explained the financial difficulties faced by the OCAC, it was moved, seconded, and carried that the Committee ask the OFL Executive Board "to approve \$3,000 for OCAC to pay for a staff person for one day a week for six months to help organize on the choice issue". That request was approved by the OFL Executive Board on September 19, 1984, at a meeting at which no one from OPSEU was in attendance.

15. During 1984, the OFL Women's Committee consisted of two co-chairpersons (one of whom was Ms. Sceviour), seventeen members, and four alternates. Those 23 persons came from over a dozen different unions. The only person from OPSEU on the committee was Frances Lankin. Ev Sammons, another member of OPSEU, was also in attendance at the Women's Committee meeting on September 10, 1984. However, she was merely present as an observer, in her capacity as a vice-president of the OFL, and not as a representative of OPSEU.

16. The Women's Committee section of the Officers' Report prepared for the November 1984 OFL Convention includes the following information:

.... The Committee was active in supporting the OFL resolution on abortion clinics through internal union education as well as public support at rallies.

Ms. Sceviour testified that only about one or two percent of the time of the Women's Committee is devoted to activities in support of "pro-choice".

17. The evidence also indicates that the Women's Committee is one of the hundreds of member groups of the National Action Committee on the Status of Women. Other member groups include the Canadian Labour Congress Women's Bureau, the National Union of Provincial Government Employees Women's Committee, and the OPSEU Region 5 Women's Caucus (identified

by Union counsel as being a very small group of women in Toronto, which has no status within OPSEU and receives no funding from it).

18. OPSEU sent thirty delegates from each of its seven geographical regions to the OFL Convention that was held in November of 1984. Half of those 210 delegates were the most senior local presidents within their respective regions. The other half were elected at regional meetings to which each local sent two or three delegates (depending on the size of the local). OPSEU's 210 delegates constituted approximately 12% of the 1,700 delegates who attended the convention. The cost of sending those 210 delegates to the convention exceeded \$100,000. At the time of registration, each of the delegates received a resolution book containing all of the resolutions in respect of which thirty days' notice had been given. One of the resolutions included in that book was Resolution 52, which pertained to abortions. "Emergency resolutions" can be brought forward within the thirty-day period preceding the OFL Convention. One such resolution which was brought forward in the thirty-day period prior to the OFL 1984 Convention called for the OFL to urge the Attorney-General of Ontario not to appeal the acquittal of Dr. Morgantaler and his colleagues. Substitute Resolution S2 combined that emergency resolution with Resolution 52. Substitute Resolution S2 was presented and distributed on the convention floor, in accordance with the normal OFL procedure. Following a 45 minute debate in which views were expressed for and against it, Substitute Resolution S2 passed by a margin of approximately two to one. OPSEU took no formal position on that resolution, and each of its delegates voted on it according to his or her own conscience.

19. "Pro-choice" supporters had hoped to have Dr. Morgantaler address the 1984 OFL convention. However, fearing the divisiveness of the abortion issue, Mr. Pilkey declined to permit Dr. Morgantaler to address the delegates in plenary session. However, the podium was made available to Dr. Morgantaler while the convention was recessed for a lunch break. Several hundred of the delegates chose to remain in the room to hear Dr. Morgantaler. Approximately \$700 was donated to Dr. Morgantaler's legal defence fund through a voluntary collection taken during that recess. Although it initially appeared that those events formed part of the basis of Mr. Tremblay's request for an exemption, during cross-examination by Union counsel Mr. Tremblay clarified his position in that regard by telling the Board, "It wasn't done during the business of the convention. What they do during their lunch is their own business. My complaint is about the resolution."

20. Mr. Tremblay is of the view that "secular humanism" is Dr. Morgantaler's "religion", and that by adopting Substitute Resolution S2, the OFL violated its Constitution by supporting Dr. Morgantaler's religious beliefs. However, it is not within the Board's jurisdiction in these proceedings to determine whether or not such a violation occurred. Accordingly, we express no opinion concerning that matter, which must be resolved in another forum. Mr. Tremblay also expressed concern that Mr. Pilkey had attended a "pro-choice" rally in June of 1983 and had pledged "labour's support" in the battle to change Canadian abortion laws. Mr. Tremblay acknowledged during cross-examination that he is more concerned about the OFL and statements made by Mr. Pilkey than he is about OPSEU and its leaders' statements. His testimony in that regard included the following statements: "I see the OFL as a much more serious problem than OPSEU. I can't get out of the OFL so I am trying to get out of OPSEU.... Pilkey is much more outspoken [in support of] free-standing abortion clinics than Clancy or O'Flynn.... When Pilkey speaks, he speaks as having 800,000 union members behind him. When Clancy or O'Flynn speak they have only [a fraction] of that.... Pilkey is a much more visible figure."

21. In addition to the aforementioned \$3,000 which the OFL donated to the OCAC, Mr. Tremblay identified the costs of that portion of the 1984 OFL Convention devoted to the debate and vote on Substitute Resolution S2 as being expenditures pertaining to "the abortion issue" that have been incurred by the OFL, and partially funded by OPSEU. He also suggested that various

other indirect expenses, including a portion of the costs incurred by OPSEU in sending a representative to the OFL Women's Committee, constituted "pro-choice" expenditures. However, he advised the Board that he is not seeking a partial exemption such as that requested in the proceedings before the Mitchnick panel, because he has concluded that such an approach is "totally unworkable". Thus, he seeks a total exemption in the present case.

22. At the conclusion of the testimony of the two witnesses called by the Union in these proceedings, the parties advised the Board that they had agreed to the following facts being accepted by the Board without formal proof:

OPSEU has spent many, many thousands of dollars since 1981 in respect of research, education, negotiations, and grievances in respect of reproductive hazards in the work place. Much of the focus has been on VDT's, and the effect of VDT's on the unborn. There have been publications, books, pamphlets, etc.

23. In opposing Mr. Tremblay's application, counsel for the Union attempted once again to persuade the Board to find that section 53 applies only to persons who are opposed to trade unionism in general. In support of that position, he noted the Legislature's use of the word "an" rather than "the" before 'employee organization' in section 53(2). He also referred the Board to the dissent in *Mary Guyer and Barbara Janice Hall*, [1985] OLRB Rep. July 1057, and the Canada Labour Relations Board decision dated May 26, 1986 in *Richard Barker and Teamsters Union Local 938*. However, nothing in that dissent or in the C.L.R.B. decision persuades us that we should depart from the approach which this Board has consistently followed for over fifteen years since its decision in *Klaas Stel*, [1971] OLRB Rep. July 363, in the context of section 47 of the *Labour Relations Act*, and which, for the reasons contained in paragraph 11 of the Mitchnick panel's decision, is equally applicable to section 53 of the *Colleges Collective Bargaining Act*.

24. In arguing against the granting of an order under section 53, counsel for the Union noted that Mr. Tremblay had expressed the view that "a pro-life organization tries to protect the life of the unborn". Applying that definition to the agreed facts quoted above, counsel submitted that, on Mr. Tremblay's terms, OPSEU is a "pro-life" organization. However, we do not find the characterization of OPSEU as a "pro-life" or "pro-choice" organization to be of assistance in deciding this case. The key issue in these proceedings is whether Mr. Tremblay has satisfied the Board on the balance of probabilities that he objects to paying dues or contributions to OPSEU because of his religious convictions or belief.

25. Union counsel also submitted that acts or omissions of the OFL, such as its \$3,000 donation to the OCAC and its adoption of Substitution Resolution S2, do not provide Mr. Tremblay with a valid basis for exemption under section 53(2) as they are not acts or omissions of OPSEU. In this regard, it was his contention that it is implicit in section 53(2) that the basis for exemption must be an act or omission of the employee organization itself, and not of some other entity.

26. In *Humber College*, [1983] OLRB Rep. Sept. 1472, Dr. J. Immanuel Schochet, who was the Rabbi of a Jewish congregation in Toronto and a teacher of philosophy at Humber College, applied for an exemption from payment of dues to OPSEU on the basis of OPSEU's participation in an OFL Convention in November of 1982 at which a resolution was passed concerning the Middle East, in which the OFL urged the Canadian Labour Congress "to call upon the Canadian Government to support all avenues toward lasting peace in the region including:

- withdrawal of all foreign troops from Lebanon and their replacement by a United Nations peace-keeping force,

- recognition of Israel's right to live within secure borders based on pre-1967 boundaries,
- recognition of the right of the Palestinian people to a secure and independent homeland,
- recognition of the PLO as the legitimate representative of the Palestinian people."

In unanimously dismissing that application, another panel of the Board (chaired by the person who was the Chairman of the Board at that time) found that the basis of Dr. Schochet's claim for exemption was political rather than religious in nature, and also concluded that his objections were "entirely too remote in relation to [OPSEU] to satisfy the Board that [he] objects to paying contributions because of his religious convictions."

27. In *Re Ontario Public Service Employees Union and Forer et al.* (1984), 46 O.R. (2d) 789, 10 D.L.R. (4th) 602, the Divisional Court quashed a decision of the Ontario Public Service Labour Relations Tribunal which had granted a "religious exemption" to Chaim Forer from payment of dues to OPSEU on the basis of the aforementioned OFL resolution concerning the Middle East (pursuant to section 16(2) of the *Crown Employees Collective Bargaining Act*, which is identical to section 53(2) of the *Colleges Collective Bargaining Act* in all material respects). In quashing that decision, the majority of the Court approved the Board's decision in *Humber College, supra*, and expressed agreement with the Board's reasoning on "both the question of remoteness and the requirement that the words or actions leading to an objection must have *some* measure (viewed objectively) of religious content." In commenting on the remoteness from OPSEU of the OFL resolution, Smith J. wrote, in part, as follows (for the majority):

Another equally cogent reason why the Tribunal's decision cannot stand lies in the remoteness of the OFL resolution. OPSEU as such took no position and it is of course the bargaining agent.

(The majority went on to note that since the Canadian Labour Congress had rejected the thrust of the resolution, the substratum of the "religious objection" had disappeared by the time the Tribunal heard the matter.) On November 21, 1985, the Ontario Court of Appeal allowed an appeal by Mr. Forer and the Tribunal from that judgment, on the grounds that the privative clause (s. 39 of the *Crown Employees Collective Bargaining Act*) precluded judicial interference with the Tribunal's decision as it was not "patently unreasonable", and as there was some evidence before the Tribunal which would support its factual findings. In writing the unanimous judgment of the Court, Blair J. A. characterized remoteness as a "factual issue", and wrote as follows concerning that issue (in (1986), 52 O.R. (2d) 705, at pages 728 and 729, and 23 D.L.R. (4th) 97, at page 121):

In order to avoid confusion with the main question of interpretation and application of s. 39, I deferred reference to two factual issues on which the majority in the Divisional Court disagreed with the Tribunal. The first issue arises from the fact that the resolution, against which Mr. Forer complains, was not passed by OPSEU, the union to which his dues were paid, but by the OFL, a federation of unions of which OPSEU was only one member. The argument was that OPSEU itself had done nothing to justify an objection under s. 16(2). The majority in the Divisional Court accepted this argument and held that the OFL resolution was too "remote" to provide a valid ground for objection by a member of OPSEU.

The second issue is whether, at the time of the hearing by the Tribunal, there was any Middle East policy in existence to which Mr. Forer could object. It will be recalled that, under its constitution, the OFL could only recommend foreign policy resolutions for adoption by the CLC. The material placed before the Tribunal by OPSEU included a letter from the CLC to the OFL which reported that the resolution had been discussed at a meeting of the CLC executive council and that it had been decided "to reiterate the position of the CLC on the Middle East". After the Tribunal's decision an affidavit was filed with the Divisional Court stating that the effect of the CLC's action was to reject the resolution of the OFL. The majority in the Divisional Court

held that the OFL resolution was "spent" because it could have no effect unless accepted by the CLC.

Saunders J. dissented holding that there was some evidence before the Tribunal which would support its decision on both issues. I agree with him that such evidence exists. The fact of its existence precludes any interference with the Tribunal's decision.

28. In *Mary Geyer and Barbara Jannis Hall*, [1985] OLRB Rep. July 1057, another panel of the Board was called upon to determine whether two secretaries employed by the Niagara South Board of Education were entitled to be exempted from payment of dues to OPSEU under section 47 of the *Labour Relations Act*. One of the bases upon which the exemption was requested was the passage of Substitute Resolution S2 at the OFL convention in November of 1984. In rejecting that as a basis for exemption under section 47, the Board wrote, in part, as follows:

29. [Mary Geyer's] objection to the payment of dues stems first from her opposition to abortion and the OPSEU's association with the OFL's stand on abortion.... It is true that her concern about abortion arose because of her understanding that OPSEU had adopted the OFL's position on abortion. The evidence of Mrs. Jones makes it clear that OPSEU, as an organization, had not taken a formal position with regard to the OFL resolution. This made the situation similar to that in the applications of Mr. Schochet in *Humber College*, [1983] OLRB Rep. Sept. 1472 and the *Ontario Public Service Employees Union and Forer*, [1984] 46 O.R. (2d) 789 (Ont. Div. Ct.). In those cases, OPSEU's mere affiliation with an OFL resolution absent an official stand taken by OPSEU on a particular issue, was held to be too remote to be a foundation for a religious objection to membership....

29. We respectfully agree with the reasoning in those decisions and, having regard to the totality of the evidence, find the concept of "remoteness" to be applicable in the circumstances of the instant case. The OFL actions to which Mr. Tremblay objects are its donation of \$5,000 to the OCAC in September of 1984, the "pro-choice" activities of Mr. Pilkey and the OFL's Women's Committee, and the passage of Substitute Resolution S2 at the OFL Convention in November of 1984. However, OPSEU was not in a position to prevent the OFL, its officials, or the majority of the delegates to its 1984 Convention, from engaging in any of those actions. OPSEU had only one representative on the OFL's twenty-three person Women's Committee. That Committee's request that the OFL Executive Board donate \$3,000 to the OCAC was approved by the OFL Executive Board at a meeting at which no one from OPSEU was in attendance. Moreover, there is nothing in the evidence which suggests that a different result would have obtained if someone from OPSEU had been in attendance and had voted against the payment. It is clear from the totality of the evidence that, as but one of the many affiliates of the OFL, OPSEU is not in a position to dictate the activities in which the OFL, its officials, and its committees will or will not engage. With respect to the passage of Substitute Resolution S2, OPSEU's 210 delegates constituted only about 12% of the 1,700 delegates who attended the OFL Convention in November of 1984, at which the resolution was passed by a margin of approximately two to one. OPSEU took no formal position on that resolution, and each OPSEU delegate voted on it according to his or her own conscience. Thus, it is clear that the passage of that resolution was also a matter beyond the control of OPSEU.

30. For the foregoing reasons, the Board is not satisfied on the basis of the evidence before it that the applicant, because of his religious convictions or belief, objects to paying dues or contributions to OPSEU. In view of our conclusion in that regard, it is unnecessary for the Board to comment upon the submissions of the parties with respect to the constitutional validity of section 53(2) of the Act.

31. For the foregoing reasons, the application is hereby dismissed.

2452-85-R United Food and Commercial Workers Union, Local 409 chartered by United Food & Commercial Workers International Union, C-L-C, A-F-L, C-I-O, Applicant, v. **Worker's Co-operative of Consumers (Fort William) Limited**, Respondent, v. Group of Employees, Objectors

Certification - Practice and Procedure - Whether parties' agreement that assistant manager excluded from bargaining unit should result in the extension of the terminal date and the posting of a revised Form 6 Notice to Employees - Extension or reposting unnecessary

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *J. A. Ronson* and *L. Collins*.

APPEARANCES: *W. Dubinsky*, *Cheryl Cheppencko* and *Michael Fraser* for the applicant; *G. L. Firman*, *Doug Demeo* and *William J. Furioso* for the respondent; *William G. Shanks* and *Della Bandiera* for the objectors.

DECISION OF THE BOARD; February 4, 1987

1. The following decision was given orally at the conclusion of the hearing of this matter on January 30, 1987.

2. This is an application for certification.

3. In a decision dated February 17, 1986, another panel of the Board authorized a Labour Relations Officer "to enquire into and report to the Board on (a) the duties and responsibilities of the person classified by the respondent as assistant manager and (b) the list of employees filed by the respondent." Pursuant to that appointment, Labour Relations Officer B. Dresner convened meetings of the parties on March 4 and 5, 1986 at the premises of the respondent (also referred to in this decision as the "Company"). During the course of those meetings, the parties resolved the position in dispute, agreed upon an amended list of employees, and executed the following Minutes of Settlement:

1. The parties agree to the following bargaining unit description:

All employees of the respondent in the City of Thunder Bay, save and except assistant manager and persons above the rank of assistant manager.

2. The parties further agree that Enzo Benvenuto, assistant manager, is excluded from the bargaining unit on the basis that he exercises managerial authority pursuant to section 1(3)B of the Act.

3. The applicant requests the Board hear evidence on the voluntariness of the petition, file #2452-85-R.

4. The applicant requests leave of the Board to withdraw the section 8 complaint filed with the Board on January 7, 1986, file #2452-85-R.

5. A formal labour relations report is not required.

Dated at Thunder Bay the 5th day of March, 1986.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. (For ease of exposition, the applicant is also referred to in this decision as the "Union".)

5. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the City of Thunder Bay, save and except assistant manager and persons above the rank of assistant manager, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The amended list indicates that there were fifteen employees in the bargaining unit at the time the application was made. The applicant has filed valid membership evidence (in the form of membership cards consisting of combination applications for membership and receipts) in respect of nine of those fifteen employees. The objectors have filed a statement of desire (also referred to in this decision as the "petition") in opposition to union representation. That document, which was filed with the Board in a timely manner, contains twelve signatures, including the signatures of five employees who earlier signed membership cards. Thus, the Board found the petition to be of potential relevance to the exercise of its discretion under section 7(2) of the Act, because if it were proven to be voluntary, it would raise sufficient doubt concerning the continued support for certification of the applicant by a sufficient number of employees who also signed membership cards that the Board would generally exercise its discretion under section 7(2) to direct that a representation vote be taken despite the fact that more than fifty-five percent of the employees in the bargaining unit were members of the applicant at the relevant time. Accordingly, we found it appropriate to hear evidence (and argument) as to the circumstances concerning the origination of the petition and the manner in which each signature on the petition was obtained, for the purpose of determining whether the petition represented a voluntary expression of its signatories' wishes. Before doing so, we heard the submissions of the parties concerning the matter of whether the parties' agreement that Assistant Manager Enzo Benvenuto is excluded from the bargaining unit (on the basis that he exercises managerial authority) should result in the extension of the terminal date and the posting of a revised (Form 6) Notice to Employees of Application for Certification and of Hearing, in view of the fact that the position of assistant manager was included in the bargaining unit initially claimed by the applicant to be appropriate for collective bargaining (i.e., "all employees of the Respondent in the City of Thunder Bay, save and except Manager and persons above the rank of Manager"). However, we have determined that no such extension or reposting is necessary or appropriate in the circumstances of this case. Counsel for the applicant advised the Board during the course of his opening submissions that his client would not be relying on anything said or done by the assistant manager concerning the petition, in support of its contention that the petition was not voluntary. Accordingly, no evidence was presented concerning that matter, which has become a non-issue in the circumstances of this case.

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[Remainder of decision omitted: Editor]

1457-86-R; 1562-86-U Labourers' International Union of North America, Local 183, Applicant, v. **Zest Furniture Industries Limited**, Respondent, v. Group of Employees, Objectors; Labourers' International Union of North America, Local 183, Complainant, v. **Zest Furniture Industries Limited**, Respondent

Certification Where Act Contravened - Unfair Labour Practice - Whether wishes of employees not likely to be ascertained in a vote an objective test - Testimony concerning impact of employer misconduct on individual employees excluded - Applicant certified without vote

BEFORE: *Judith McCormack*, Vice-Chairman, and Board Members *F. W. Murray* and *B. L. Armstrong*.

APPEARANCES: *Mark Zigler*, *Michael Block* and *Walter Ruszczak* for the applicant/complainant; *Roy Filion*, *S. Alosinac* and *M. Domitric* for the respondent; *Rolf Klingel* for the objectors.

DECISION OF JUDITH McCORMACK, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; February 10, 1987

1. The name of the respondent is amended to read: "Zest Furniture Industries Limited".
2. This is an application for certification in which the applicant has invoked section 8 of the *Labour Relations Act*. Upon the agreement of the parties, the Board ordered that this application and a complaint filed by the applicant under section 89 of the Act be consolidated for hearing.
3. The Board finds the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties and the manner in which the Board generally describes bargaining units of this type, the Board finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.
5. In accordance with the Rules of Practice respecting applications for certification the respondent filed a list of employees. The applicant took the position that seven people on that list should be excluded from the bargaining unit on the basis that they exercised managerial functions within the meaning of section 1(3)(b). The parties agreed to defer the appointment of a Labour Relations Officer to inquire into the duties and responsibilities of the seven challenged people until after the disposition of the application for certification and the section 89 complaint. To the extent that the employment status of some of the challenged people was relevant to the section 8 application, the parties led evidence on their duties and responsibilities during the course of the hearing. As it turned out, it was not necessary for the Board to make findings in this regard for the purpose of determining the matters before us.
6. Similarly, the parties agreed to defer the Board's inquiry into the circumstances of a petition filed by employees in opposition to the union. An application under section 1(4) of the Act, a constitutional challenge and allegations that the membership evidence was defective were withdrawn by the parties.
7. The respondent in this matter operates a furniture factory in Toronto in which approxi-

mately 49 people are employed in the manufacture of custom furniture. The applicant union's organizing campaign commenced in July of 1986 when Steven Saunders, a machine set-up operator who had been employed by the respondent for approximately two years, contacted the union indicating that he and his fellow employees were interested in unionization. Mr. Saunders met with Walter Ruszczak, one of the union's business agents, and Mr. Saunders subsequently became the chief in-plant organizer.

8. A union meeting was scheduled for August 13, 1986 and Mr. Saunders undertook to notify other employees accordingly. At that meeting a number of employees signed union membership cards. Mr. Saunders and another employee, Ken Farquharson, also volunteered at that time to canvass other employees and collect membership cards.

9. On August 14 and 15, Mr. Saunders approached a number of employees at noon hour and at breaks in the lunch area to suggest that they sign union cards. Donata Georgio, another employee, assisted him in this regard by speaking to employees in their own language. If employees approached in this fashion wished to sign cards, Ms. Georgio would then pass them over to where Mr. Saunders was sitting and he would arrange for them to sign cards and pay their membership fees. Mr. Farquharson was also approaching employees to convince them to join the union in this area, and was eventually successful in collecting several cards in other locations. The lunch area consists of an open space on the plant floor where a number of tables have been placed for employees. Mr. Saunders testified that he saw three of the respondent's lead hands, Angelo Diblasi, Vinco Grbin and Nick Macchirulo watching these activities in the lunch area.

10. Steve Alosinac is the president and major shareholder of the respondent, and Martin Domitric is the plant manager. They first became aware that there were rumours about a union in the plant on August 14th or 15th of 1986, when a lead hand, Mr. Diblasi informed Mr. Domitric that employees were discussing a union at their lunch hour. Mr. Domitric then advised Mr. Alosinac accordingly and the two men discussed the matter briefly.

11. In the morning of Friday, August 15th, Mr. Domitric reprimanded Mr. Saunders for walking around the plant and talking to other employees during working hours. Mr. Domitric told the Board that he had received complaints from Mario Lontini, the lead hand in the finishing department, that Mr. Saunders had been in that department talking to people on work time.

12. At lunch hour that day, Ms. Giorgio had conversations with three employees who then signed union cards with Mr. Saunders. Several hours later, Ms. Giorgio was summoned to Mr. Domitric's office and told that she was being terminated because she had not successfully passed her probationary period. At that point she was five days away from the completion of her three-month probationary period.

13. On the morning of Monday, August 18, 1986, Mr. Saunders was transferred to another warehouse operated by the respondent under the name Rodenbury Investments Limited. This warehouse is located several miles from the plant and is staffed by only two people, Mr. Saunders, and a representative of an unrelated company which rents the warehouse space for the purposes of storing whisky for aging. At noon hour on that same day, Mr. Farquharson was sent home by Mr. Domitric because he was eating his lunch in the parking lot and subsequently terminated for that and other reasons. No membership cards were signed after August 15th.

14. This, then is the sequence of events which prompted the matters presently before the Board. Turning first to the matter of the section 89 complaint, the applicant alleges that the respondent has contravened sections 64, 66, and 70 of the Act by, among other things, discharging

Mr. Farquharson and Ms. Giorgio, transferring Mr. Saunders and involving itself in the circulation of the petition in opposition to the union.

15. Mr. Alosinac testified with respect to the reasons for Mr. Saunders' transfer. He told the Board that the whisky storage warehouse had opened for the first time on August 14th and barrels of whisky started arriving on August 15th. He required an employee who could read and write English fluently to work in the warehouse, and he first selected another employee, Mark Taber, for this position. However, Mr. Taber did not have his own car, which emerged as a problem on his first day of work, August 15th, as he could not get rides to and from work with the whisky manufacturer's trucks as Mr. Alosinac had first assumed. The warehouse area is not serviced by public transportation.

16. On Monday, August 18th, Mr. Alosinac approached Mr. Domitric in the morning to see whom else he could suggest who had both the necessary qualifications and his own car. Only approximately 5% of the respondent's employees meet these criteria. Mr. Domitric recommended Steven Saunders and Mr. Alosinac went to Mr. Saunders, explained the situation and told him to follow him out to the warehouse. During the time Mr. Saunders worked at the warehouse, he was paid by Rodenbury Investments Limited.

17. Mr. Saunders testified that Mr. Alosinac collected him on Monday morning at 9:20 and took him out to the new warehouse. The transfer was so sudden that Mr. Saunders' foreman, Matt Fray, was not aware of it until Mr. Saunders called him that night and advised him. Initially he received no instructions with respect to his new duties and for the first two or three days "watched the planes fly overhead" until a representative from the whisky manufacturer showed him what to do. Even then the duties were undemanding, consisting of counting whisky barrels when they arrived and signing for them. As a machine set-up operator, Mr. Saunders is one of the more skilled employees in this workforce.

18. Mr. Domitric, who effectively chose Mr. Saunders for the warehouse position, was a terse and unforthcoming witness. He claimed that he was unaware of which employees were involved in the organizing campaign at the time of both the transfer and the two subsequent discharges and reiterated during his testimony that he was "not even interested" in finding out. However, the source of his information was Mr. Diblasi, who was clearly aware of the three grievors' involvement as a result of his observation of the lunch area. Whether or not Mr. Diblasi was himself a member of management, there is little question that he was providing information to Mr. Domitric at the time. We find it implausible that Mr. Diblasi would feel the need to report to Mr. Domitric on the events in the lunch area which were of obvious interest to the respondent but would say to him only that employees were discussing a union at lunch, as Mr. Domitric maintains.

19. Mr. Domitric also claimed that he did not know what Mr. Saunders was talking to other employees about when he warned him to stop doing so on Friday morning. Again we find this disingenuous on Mr. Domitric's part, even if his own version of Mr. Diblasi's report is accepted. Moreover, Mr. Domitric's testimony conflicted with that of Mr. Alosinac in this general area; while Mr. Alosinac admitted that he and Mr. Domitric "guessed" that Mr. Saunders was involved in the union's activities after August 19 when the application for certification arrived, Mr. Domitric denied knowing of Mr. Saunders' involvement even at that point. Both Mr. Alosinac and Mr. Domitric told the Board that their lack of concern stemmed from the fact that they did not take the rumours of the union seriously. However, it must have been obvious from the activity in the lunchroom that the campaign was well beyond the point of mere rumours, and in this context we find their assertions unconvincing.

20. Mr. Domitric testified that his posture of uninvolvement was the result of his experience

with a previous employer who was found by the Board to have engaged in unfair labour practices. However, his assertions are not consistent with other evidence before us, notably that of Steve Drvaric, another employee of the respondent who testified that Mr. Domitric had approached him to sign a petition against the union. Although Mr. Drvaric participated in the union campaign to the extent of approaching one employee to sign a card after Mr. Saunders was transferred, he was clearly uncomfortable in this role and he was also a countryman and personal friend of Mr. Domitric's. We found Mr. Drvaric to be a more credible witness than Mr. Domitric and where their evidence conflicts, we accept the evidence of Mr. Drvaric.

21. We do not doubt that Mr. Alosinac required an employee at the whisky warehouse. However, we cannot avoid the conclusion that Mr. Domitric and Mr. Alosinac were aware of Mr. Saunders' central role in the organizing campaign at the time he was transferred. This knowledge and their lack of candour, coupled with the timing, manner and circumstances of his transfer, lead us to the conclusion that the reasons for his removal from the plant were not free from anti-union animus.

22. Evidence was given by both Mr. Alosinac and Mr. Saunders with respect to a loan made by the former to the latter to enable Mr. Saunders to buy new tires for his car when his old tires were slashed in an unrelated incident. We do not find this inconsistent with our conclusion. Aside from the fact that transportation to the warehouse was essential, it seemed that Mr. Saunders was a relatively skilled employee in the plant and that there was some rapport between Mr. Alosinac and him. This does not mean that Mr. Alosinac and Mr. Domitric refrained from interfering in the union's campaign; rather, it is consistent with the fact that the steps taken in the case of Mr. Saunders were not as personally detrimental as those taken in the case of the other grievors. In these circumstances, we conclude that effectively quarantining the chief union organizer constituted unlawful interference by the respondent in the applicant's campaign.

23. The discharges of Ms. Giorgio and Mr. Farquharson are more difficult matters. Mr. Domitric testified that he was responsible for the decision to terminate both employees. Ms. Giorgio was hired on May 20, 1986, and Mr. Domitric told the Board that there were complaints about her work from the first week of her employment. As a result, she was transferred through a number of areas in the plant. In each new area, he testified, there were either further complaints or he observed problems with her work. As a result, in August he decided to check on the expiry date of her probationary period. When he ascertained that there were several days remaining, he terminated her on August 15, 1986. Mr. Domitric stated that he had discussed the problems with Ms. Giorgio's work with her on a number of occasions, an assertion that Ms. Giorgio disputes. She testified that she was moved through the plant because the level of work fluctuates in each area and she was moved when another employee was required in an area.

24. Mr. Domitric produced a list of probationary employees fired between June 20th and August 15th of 1986 which showed the duration of their employment. Although he advised the Board that there was no pattern to the length of unsuccessful probationary periods, we note that the other three employees listed were only retained for 17 days, 25 days and 25 days, respectively. None were discharged after 87 days of employment as in Ms. Giorgio's case, and we do not find the fact that part of that period was vacation satisfactorily explains this discrepancy. Our concern in this regard is reinforced by the timing of the discharge. If there were complaints and problems associated with Ms. Giorgio's work from the first week of her employment, and if those problems persisted to the extent Mr. Domitric maintains, we find it curious that she was not discharged until several hours after she persuaded three employees to join the applicant union. Looking at the evidence as a whole, we find that the respondent has failed to satisfy us on the balance of probabilities that the reasons for Ms. Giorgio's discharge were untainted by anti-union motives.

25. Turning to the discharge of Mr. Farquharson, Mr. Domitric testified that a week prior to his termination he had found Mr. Farquharson eating his lunch in his van in the parking lot. At that time he had told Mr. Farquharson not to do so in the future because there had been complaints about litter in the parking lot by the respondent's industrial neighbour. As well, Mr. Domitric did not want the plant doors left open. If Mr. Farquharson wanted to leave the plant during lunch time, Mr. Domitric also told him to punch out. When he found Mr. Farquharson again eating his lunch in his van on August 18th without having punched out, he told the Board that he tried to warn him again. At that point, Mr. Domitric testified that Mr. Farquharson turned away from him and told him to get lost. Mr. Domitric instructed him to punch out and go home, and that he would let Mr. Farquharson know when he could come back. He advised the Board that he subsequently examined Mr. Farquharson's file and saw a number of absences and late arrivals on his record. As a result, he decided to discharge him. The reasons he gave for the discharge were insubordination, poor work performance and absenteeism. When Mr. Farquharson called the next day to inquire about his status, Mr. Domitric told him that he was fired.

26. Mr. Farquharson was a candid witness who volunteered information that was not necessarily in his interests. He acknowledged that Mr. Domitric had previously warned him against eating lunch in his van and that he was eating lunch again in his van on the day Mr. Domitric sent him home. His description of the conversation tallies with Mr. Domitric's, except on two points; Mr. Farquharson denied telling him to get lost and when Mr. Domitric advised him that he was fired, Mr. Farquharson testified that he did not mention insubordination.

27. Having had the opportunity to assess the credibility of both Mr. Domitric and Mr. Farquharson with respect to this sequence of events, we find the evidence of Mr. Farquharson to be more reliable and we therefore reject the contention that Mr. Farquharson told Mr. Domitric to get lost. The remaining reasons advanced for Mr. Farquharson's discharge consist of an immediate but relatively trivial incident of insubordination (eating lunch in his van), together with his past record.

28. The records submitted by the respondent show that Mr. Farquharson had been absent once during his employment period of five months although he was frequently late. However, his records also show that his lateness problem commenced the day after he was hired and was consistent throughout the duration of his employment. We find it difficult to reconcile the respondent's tolerance of his lateness in the past with the significance subsequently accorded to it in the decision to fire him. While there was some evidence that Mr. Farquharson had been spoken to about his lateness, it seems clear that he would have passed the three-month probationary period established in evidence with at least ten late arrivals and one absence.

29. The remaining reason relied upon by the employer was a verbal warning issued several months earlier in regard to Mr. Farquharson's productivity. Taken as a whole, we do not find this record convincing when recruited in support of the employer's reasons.

30. The fact that Mr. Farquharson was eating his lunch in his van again after Mr. Domitric's warning is not insignificant. However, Mr. Domitric testified that his initial response was simply to warn him again and it was not until Mr. Farquharson allegedly told him to get lost that he sent him home. Even then, he was not fired until further reflection by Mr. Domitric. In the circumstances of this case, we find it difficult to avoid the conclusion that Mr. Domitric took the opportunity presented by Mr. Farquharson's infraction to discharge him for other anti-union reasons as well.

31. It is true that Mr. Farquharson kept a lower profile with respect to his union activities than either of the other two grievors. However, there is no question that he was soliciting cards and, according to Mr. Saunders, he was approaching employees in the same work area which was

under observation by the three lead hands, including Mr. Diblasi. Although the evidence is not unequivocal, in the circumstance of this case we conclude on the balance of probabilities that Mr. Farquharson's discharge was not free from anti-union animus.

32. To summarize at this point, we find that the employer has violated sections 64, 66 and 70 of the Act with respect to the transfer of Mr. Saunders and the discharges of Ms. Giorgio and Mr. Farquharson.

33. Before the Board will exercise its discretion to certify a union under section 8, three conditions must be met. It must be established that there has been:

- (1) an employer contravention of the Act, so that,
- (2) the true wishes of the employees are not likely to be ascertained; and
- (3) that the union has membership support adequate for collective bargaining.

The first condition has been met by our findings above. The Board must now consider whether the second element of section 8 has been satisfied.

34. Before turning to our conclusions on this point, we wish to address an evidentiary problem which arose with respect to the aspect of section 8. Counsel for the applicant sought to introduce evidence during the hearing as to statements made by other unnamed employees to a witness with respect to such other employees' feelings or responses as a result of the respondent's activities. When counsel for the respondent objected, counsel for the applicant argued that such evidence was pertinent to the issue of whether or not the alleged employer conduct meant that the true wishes of employees were not likely to be ascertained within the meaning of section 8. He suggested that the alternative would be to summon the other employees as witnesses to provide direct evidence of their responses and that such a course of action would be both time-consuming and would reveal their identities and their views about union representation. In his view, section 111(1) was designed to protect employees from this kind of exposure.

35. Counsel for the respondent argued that the evidence in question was hearsay and that if the employees alleged to have made certain statements were not called as witnesses or even named, the disadvantages to the respondent in terms of cross-examination and reply were so significant that the respondent would be deprived of a full opportunity of making its case. In addition, if the evidence could not be tested in the usual fashion, its probative value was so low as to militate against its admission.

36. The Board made the following oral ruling which counsel for the applicant requested be included in our written decision (Board Member Armstrong dissenting):

The evidence the applicant wishes to bring forward, while marginally relevant is of very limited value to the Board in its present form, that is, hearsay where the source is unidentified. Under the circumstances, we are not prepared to allow the applicant to pursue this line of questioning.

We now provide our reasons.

37. In examining whether the employer's contraventions have resulted in a situation where the true wishes of employees are not likely to be ascertained, the Board applies an objective rather

than a subjective test. The Board described it in this way in *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250:

In other words, it must be demonstrated by *some objective measure* that the contravention of the Act, whether by any overt act or subtle subterfuge is so perverse that the likelihood of a meaningful expression of employee views is lost.

[emphasis added]

38. In some cases, the Board has referred to the impact of employer misconduct on an “employee of average intelligence and fortitude” (*Wolverine Tube, Division of Calumet and Hecla of Canada Limited*, 63 CLLC ¶16,296) while in others the bench mark has been expressed in terms of the “typical employee” (*Seven-UP/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87). The Board will examine both the nature of the employer’s misconduct and the circumstances in which it took place, and its conclusions will vary depending on the specific mix of factors that it finds in any particular situation.

39. Where the impact of misconduct is obvious, it may be that no demonstrative evidence will be required. As the Board noted in *Robin Hood Multifoods, supra*:

There may be occasions, however, where the contravention would so obviously undermine the likelihood of a free vote (such as a direct or implicit threat to employees’ job security) that no demonstrative evidence need be adduced with respect to [whether the conduct was such that the true wishes of the employees were not likely to be ascertained].

40. In other cases, it may be useful for the parties to adduce facts which might enlighten the Board as to the effect of less obvious misconduct in the circumstances of a specific work place, including objective facts which may show that the impact of certain activities is enhanced or diminished in the particular circumstances. But in all cases the test the Board uses will not be how or whether employee “A” or employee “B” was personally affected, but rather the likely impact of the misconduct on the typical employee. Consequently, it is neither necessary nor desirable for the parties to parade a series of employees before the Board to testify as to their individual responses or feelings as a result of the employer’s activities.

41. Not only is such a procedure time-consuming and expensive, but the evidence proffered is often unreliable. (See *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848). The Board commented on this problem in *Wolverine Tube, supra*:

Our colleague, in his dissent, apparently takes the position that as there is no direct testimony from the employees themselves that they were in fact influenced by the conduct of the employer, there is, therefore, no evidence before us on which we can properly find that [a previous vote] did not disclose the true wishes of the employees. It is, of course, a trite principle in the law of evidence that no party is bound to prove all of its case by direct evidence. Reasonable and necessary inferences may and must be drawn from all the evidence adduced and that which is clearly inferable from the evidence it is much proved as if it had been established by direct evidence. *Indeed, in reaching a decision as to whether or not employees have or have not been influenced by improper conduct on the part of a union or employer, the Board has often been constrained to view the objective facts and overt acts of the parties with the reasonable inferences to be gathered from them, as more persuasive evidence of the true facts than the subjective assertions and counter assertions of employees, given in the presence of the union or employer, that they were or were not influenced or in what way, by the conduct in question.*

[emphasis added]

42. Where such evidence supports the employer’s point of view, the peculiar vulnerability

of employees can result in a desire on their part to publicly associate themselves with their employer. As the Board commented in *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140:

Firstly, the Board's procedures do not favour the taking of viva voce evidence from employees in the presence of their employer at a Board hearing as the optimal means of determining their wishes respecting union representation. The Board's jurisprudence has long recognized the natural affinity of an employee to identify, publicly, at least, with the interest of his employer.

43. Indeed, where an employer has engaged in unfair labour practices, it may be difficult to know whether such testimony has itself been influenced by those activities. (See: *Lorain Products (Canada) Limited*, [1977] OLRB Rep. Nov. 734.)

44. Even where the evidence is brought out through union witnesses, it may be of little value when the Board has no way of knowing whether a witness is representative of other employees. The fact that the views of a union stalwart remain unchanged does not tell the Board very much about the views of those who are less committed. The Board's task is to assess the impact of particular misconduct on the ability of a typical employee to express his or her wishes, that is, one who is neither unusually intrepid nor unusually timid.

45. Given that the value of this kind of evidence is marginal in the first place, hearsay evidence of a similar nature where the source of the hearsay is unidentified will be of even less assistance. Thus, the majority of the Board found that its probative value was so low that its disadvantages outweighed its utility.

46. The facts of the instant case lead us to the conclusion that the employer's violations have created a climate in this workplace in which the wishes of employees are not likely to be ascertained. The evidence establishes that three union activists in this matter were either abruptly discharged or transferred shortly after they commenced their union activities. The message that these actions would have vividly conveyed to employees was that supporting a union was a perilous undertaking. The respondent's actions go directly to the core of economic dependency which is the basis for an employee's vulnerability in the workplace. As the Board noted in *DI-AL Construction Limited*, [1983] OLRB Rep. March 356, at page 360:

A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made it clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote. Accordingly I am of the view that the applicant should be certified pursuant to the provisions of section 8 of the Act.

47. The Board has found discharges of union supporters to give rise to a finding that employee wishes are not likely to be ascertained in a number of cases: see *Dylex Limited*, [1977] OLRB Rep. June 357, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *The Globe & Mail*, [1982] OLRB Rep. Feb. 181 and *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564.

48. In this case, the respondent's counsel argued, among other things, that since Mr. Saunders was reinstated to his former job by agreement of the parties on the last day of the hearing, his reappearance should serve to ameliorate any damage which may have been done by the employer's

activities. Considering that the gap between Mr. Saunders' disappearance and his return was some two months, and the fact that Mr. Farquharson and Ms. Giorgio have not been reinstated, we do not find this persuasive. Whatever curative effect Mr. Saunders' reinstatement may have produced is not sufficient to undo the mischief that has been done to the ability of employees to freely express their wishes. The Board has come to a similar conclusion in circumstances where the curative steps were far more extensive than that described here (see *Elbertsen Industries Limited, supra*). We are satisfied that the second element of section 8 has been established in this case.

49. Finally, we must consider whether, in our opinion, the applicant has membership support adequate for the purpose of collective bargaining. The respondent's counsel pointed to the fact that only one person who signed a membership card also signed the petition and argued persuasively that this entitled the Board to conclude that the employer's conduct did not influence the wishes of union members. The voluntariness of the petition was deferred at the parties' request and as a result, there has been no finding in this regard. The only evidence we have before us with respect to the petition is that of Mr. Drvaric which we do not find reassuring in this respect. The fact that the petition was circulated after the two discharges and the transfer means that we have no way of knowing whether potential union members might have opted for the petition because it was the safest course of action in the climate of this work place. In other words, we find the fact of the petition ambiguous and of little assistance one way or another. However, even assuming, without finding, that the petition was voluntary and that the lead hands are included in the bargaining unit, it is clear from the membership evidence filed that the applicant has the support of some 47% of employees. Under the circumstances, we are satisfied that there is membership support adequate for collective bargaining.

50. We therefore determine that the applicant be certified as the bargaining agent for the employees in the bargaining unit set out earlier.

51. Since we have previously determined the appropriate bargaining unit, a final certificate will issue. If the parties are unable to settle the question of whether the lead hands are to be included in that bargaining unit, they are entitled to pursue the matter by way of an application under section 106(2) of the Act (see *Robin Hood Multifoods*, [1985] OLRB Rep. July 1159).

52. Furthermore, since we have found that the respondent violated the Act, the Board hereby directs the respondent, pursuant to section 89:

- a) to forthwith reinstate Donata Giorgio and Ken Farquharson to employment to the positions that they held immediate prior to their discharge;
- b) to pay to Donata Giorgio and Ken Farquharson compensation for their loss of wages and benefits;
- c) to pay Donata Giorgio and Ken Farquharson interest on the compensation ordered by the Board, such interest to be calculated in the manner described in Practice Note No. 13, dated September 1980;
- d) to sign and post copies of the attached notice marked "Appendix" as supplied by the Board in conspicuous places on its premises and to keep such notices posted for sixty (60) working days and to take all reasonable steps to ensure that the notices are not altered or defaced or covered by any other material; and
- e) to provide reasonable access to a representative of the applicant to per-

mit the applicant to satisfy itself that the respondent has complied with this posting order.

53. The Board remains seized to resolve any dispute with respect to implementing these orders.

DECISION OF BOARD MEMBER F. W. MURRAY;

1. I dissent.

2. I do not share my colleague's doubts concerning the testimony of Domitric, the plant manager.

3. I believe the testimony of both S. Alosinac and M. Domitric concerning the temporary transfer of Saunders to the whisky warehouse operation.

4. I also believed the testimony of M. Domitric concerning the terminations of both Farquharson and Ms. Giorgio.

5. Accordingly, I would not have found the transfer of Saunders and the discharges of Ms. Giorgio and Mr. Farquharson to be in violation of sections 64, 66 and 70 of the Act. It follows therefore that I would not have certified the applicant under section 8 of the Act.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAYOFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

ZEST FURNITURE INDUSTRIES LIMITED

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2015-85-R: Ontario Public Service Employees Union (Applicant) v. North Waterloo Society for Crippled Children (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Kitchener, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff, maintenance staff, support staff, teachers employed in the capacity of a certified teacher, and persons regularly employed for not more than 24 hours per week" (28 employees in unit)

2106-85-R: Le Syndicat des Employes de Ser Vaas (CSN) (Applicant) v. Ser Vaas Rubber Company Inc. (Respondent) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Intervener)

Unit: "all employees of the respondent in the City of Cornwall, save and except foremen, those above the rank of foreman, office and clerical staff, laboratory employees, and persons employed less than 24 hours per week and students employed during the school vacation period" (38 employees in unit)

0073-86-R: The Canadian Union of Public Employees (Applicant) v. 538414 Ontario Limited, c.o.b. as Riverside Nursing Home (Respondent)

Unit: "all employees of the respondent at Riverside Nursing Home in the City of Windsor regularly employed for not more than 24 hours per week, and students employed during the school vacation period, save and except the administrator, dietary supervisor, nursing director, social director, secretary and receptionist and persons above these ranks, and registered nurses" (18 employees in unit)

0204-86-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. C. N. Hotels Inc. (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto save and except executives, managers, assistant managers, sales staff, credit staff, personnel office employees, security officers, patrolmen, head housekeepers, auditors, food, beverage and storeroom control, beverage supervisor, receiving, supervisors, employees of the front office, reservations, mail, key and information clerks, stenographers, receptionists, typists, accounting department, cashiers and all other office and clerical staff, recreation club attendants, inspectors, floor supervisors, Friendly's supervisor, executive chef, sous chef, manager of pastry, maitre d's, assistant maitre d's, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (270 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0419-86-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees, Local 351 (Applicant) v. Ridgewood Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Cornwall, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (70 employees in unit) (*Having regard to the agreement of the parties*)

0849-86-R: Canadian Paperworkers' Union (Applicant) v. Specialized Packaging Products Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees employed by the respondent in the City of Barrie save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (58 employees in unit) (*Having regard to the agreement of the parties*)

1321-86-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. The Upper Canada Brewing Company (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

1431-86-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. The Westin Hotel (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Ottawa, save and except assistant supervisors, persons above the rank of assistant supervisor, security staff, front desk staff, office and sales staff, concierge, bell captain, persons employed as maitre d', head greeter, lead captain, captain, lead banquet bartender, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (311 employees in unit) (*Having regard to the agreement of the parties*)

2091-86-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Charlottenburgh (Respondent)

Unit #1: (see: *Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*)

Unit #2: "all office and clerical employees of the respondent in the Township of Charlottenburgh, save and except deputy clerk treasurer, persons above the rank of deputy clerk treasurer, secretary to the chief administrative officer" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2347-86-R: United Food and Commercial Workers Union, Local 459 (Applicant) v. Omstead Foods Limited (Respondent)

Unit: "all employees of the respondent in the Townships of Ronney and Mersea, save and except forepersons, persons above the rank of foreperson, security guards, persons employed in the growing and harvesting of agricultural products, office and sales staff, quality assurance personnel, pollution control personnel, retail sales personnel, fishermen, net menders, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (519 employees in unit) (*Having regard to the agreement of the parties*)

2363-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Dafo (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2377-86-R: Local 228, I.B.E.W. (Applicant) v. Nortec Air Conditioning Industries Limited (Respondent)

Unit: "all employees of the respondent employed in the Regional Municipality of Ottawa-Carleton save and except supervisors, persons above the rank of supervisor, office staff, persons employed for not more than 24 hours per week, students employed during the summer vacation period and university students employed in co-operative work programs" (31 employees in unit) (*Having regard to the agreement of the parties*)

2387-86-R: Ontario Public Service Employees Union (Applicant) v. Atikokan & District Association for the Mentally Retarded (Respondent)

Unit: “all employees of the respondent in Atikokan, save and except Director and secretary to the Director” (8 employees in unit) (*Having regard to the agreement of the parties*)

2394-86-R: Ontario Nurses’ Association (Applicant) v. Birchwood Terrace Nursing Home Inc. (Respondent)

Unit: “all registered and graduate nurses employed by the respondent in Kenora, save and except the Director of Nursing and persons above the rank of Director of Nursing” (4 employees in unit) (*Having regard to the agreement of the parties*)

2408-86-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Crane Canada Inc. (Respondent)

Unit: “all employees of the respondent in its Crane Supply Division in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, sales trainees and students employed during the school vacation period” (15 employees in unit) (*Having regard to the agreement of the parties*)

2409-86-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Today’s Business Products Limited (Respondent)

Unit: “all employees of the respondent in Mississauga, save and except assistant supervisor, persons above the rank of assistant supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (54 employees in unit) (*Having regard to the agreement of the parties*)

2444-86-R: Canadian Union of Public Employees (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit #1: “all employees of the respondent at Theriault High School in the City of Timmins, save and except forepersons, persons above the rank of foreperson, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at Theriault High School in the City of Timmins, save and except forepersons, persons above the rank of foreperson, office and clerical staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

2471-86-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Moffatt & Powell Limited (Respondent)

Unit: “all employees of the respondent at Tillsonburg, save and except assistant manager, persons above the rank of assistant manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

2473-86-R: Canadian Union of Public Employees (Applicant) v. Peterborough-Victoria-Northumberland & Newcastle Roman Catholic Separate School Board (Respondent)

Unit: “all employees of the respondent in the Counties of Peterborough, Victoria, Northumberland and the Municipality of Newcastle regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisors, two confidential secretaries, teachers as defined by the Teacher’s Profession Act and employees for whom any trade union held bargaining rights as of December 2, 1986” (83 employees in unit) (*Having regard to the agreement of the parties*)

2485-86-R: Service Employees International Union, Local 183 (Applicant) v. Brown's Automatic Vending (1975) Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Belleville save and except managers, persons above the rank of manager, office staff, and persons regularly employed for not more than 24 hours per week" (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Belleville regularly employed for not more than 24 hours per week, save and except managers, persons above the rank of manager, and office staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

2514-86-R: United Steelworkers of America (Applicant) v. Seam Electronics Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen/leadhands, and persons above the rank of foreman/leadhand, office and sales staff, laboratory technicians, design engineers, persons regularly employed for not more than 24 (24) hours per week and students employed during the school vacation period" (54 employees in unit) (*Having regard to the agreement of the parties*)

2517-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Woodbridge Foam Corporation (Respondent)

Unit: "all employees of the respondent in its General Foam & Cushion Division in the Town of Vaughan, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, employees regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (85 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2528-86-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Bi-Way Stores Limited (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except warehouse manager, persons above the rank of warehouse manager, office, clerical and sales staff, all retail stores' staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (32 employees in unit) (*Having regard to the agreement of the parties*)

2565-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Nucan Contracting & Excavating (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2575-86-R: Teamsters Union, Local 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Personalized Leasing Services Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Mac's Delivery Service Division in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales

staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (59 employees in unit) (*Having regard to the agreement of the parties*)

2584-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Lebrun Constructors Ltd. (Respondent)

Unit: "all employees of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those employees engaged as surveyors, truck drivers and construction labourers, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

2603-86-R: Canadian Union of Public Employees (Applicant) v. St. Mary's College (owned & operated by The Corporation of Basilian Fathers of Sault Ste. Marie) (Respondent)

Unit: "all office and clerical employees of the respondent in Sault Ste. Marie, save and except department heads, persons above the rank of department head and persons for whom any trade union held bargaining rights on the date of application, December 15, 1986" (3 employees in unit) (*Having regard to the agreement of the parties*)

2604-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reid Industries Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Windsor, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (58 employees in unit) (*Having regard to the agreement of the parties*)

2621-86-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Wallaceburg Glass Workers Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Wallaceburg, save and except supervisors, persons above the rank of supervisor, and office staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

2633-86-R: Labourers' International Union of North America, Local 506 (Applicant) v. McCord & Company, A Standard Industries Company (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2671-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pape Avenue Paving Company Limited (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repair-

ing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2677-86-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Hoover Canada Inc. (Respondent)

Unit: "all employees of the respondent at Burlington, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons for whom any trade union held bargaining rights as of December 22, 1986" (4 employees in unit) (*Having regard to the agreement of the parties*)

2686-86-R: United Steelworkers of America (Applicant) v. Canadian Uniform Limited (Respondent)

Unit: "all employees of the respondent in the Town of Hawkesbury, save and except forepersons, persons above the rank of foreperson, and office and sales staff" (258 employees in unit) (*Having regard to the agreement of the parties*)

2694-86-R: Energy & Chemical Workers Union (Applicant) v. Pharmapak Ltd., c.o.b. as Nucro Technics (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except director, persons above the rank of director, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (35 employees in unit) (*Having regard to the agreement of the parties*)

2697-86-R: Retail, Wholesale & Department Store Union (Applicant) v. Dougherty's Meats Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Allanburg, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period" (35 employees in unit) (*Having regard to the agreement of the parties*)

2699-86-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Applicant) v. Micon Metals Incorporated (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Nepean save and except foremen, persons above the rank of foreman, office and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

2700-86-R: Hotel Employees & Restaurant Employees Union, Local 604 (Applicant) v. King George Tavern Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Peterborough, regularly employed as waitresses, waiters, bartenders and buspersons for less than 14 hours per week, save and except managers and persons above the rank of manager" (8 employees in unit) (*Having regard to the agreement of the parties*)

2751-86-R: Labourers' International Union of North America, Local 506 (Applicant) v. Teron International Urban Development Corporation Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0674-86-R: Toronto Printing Pressmen & Assistants' Union, Local 10, subordinate to G.C.I.U. (Applicant) v. Hartley Gibson Company Limited (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except production manager, plant supervisor, those above the rank of production manager or plant supervisor, office and sales staff and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		3
Ballots segregated and not counted		1

0897-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Starcan Corporation, c.o.b. as Concorde Metal Stampings (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Tilbury, save and except foremen, persons above the rank of foreman, and office and sales staff" (103 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		102
Number of names of persons on revised voters' list		99
Number of persons who cast ballots	99	
Number of ballots marked in favour of applicant		52
Number of ballots marked against applicant		47

1837-86-R: International Woodworkers of America (Applicant) v. G.W. Martin Lumber Limited - Eganville Division (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 1030 (Intervener)

Unit: "all employees of G.W. Martin Lumber Limited, Eganville, Ontario, save and except foremen, persons above the rank of foreman, office staff, head filer, persons regularly employed for less than 24 hours per week and students employed during the school vacation" (45 employees in unit)

Number of names of persons on revised voters' list		44
Number of persons who cast ballots	40	
Number of ballots marked in favour of applicant		39
Number of ballots marked in favour of intervener		1

2091-86-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Charlottenburgh (Respondent)

Unit #1: "all employees of the respondent in the Township of Charlottenburgh save and except foremen, persons above the rank of foreman, office and clerical staff" (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (see *Bargaining Agents Certified Without Vote*)

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		2

2184-86-R: Canadian Union of Public Employees (Applicant) v. Halton Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Halton, save and except secretary to director of education, secretary to superintendents of education, secretary to superinten-

dent of business and finance, secretary to superintendent of building and plant, secretary to personnel administration officer, accountant, payroll officer, persons above such ranks, and persons in bargaining units for which any trade union held bargaining rights as of October 29, 1986" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		68
Number of persons who cast ballots	66	
Number of ballots marked in favour of applicant		41
Number of ballots marked against applicant		24
Ballots segregated and not counted		1

2212-86-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Sketchley Cleaning Service Limited (Respondent)

Unit: "all employees of the respondent at 25 Howden Road, Scarborough, Ontario save and except foremen, persons above the rank of foreman, sales, office and clerical staff" (62 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		63
Number of persons who cast ballots	51	
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		17

2237-86-R; 2336-86-R: National Automobile, Aerospace & Agricultural Implement Workers of Canada (CAW-Canada) (Applicant) v. Koehring Canada, a Unit of AMCA International Ltd. (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO-CFL, Lodge #275 (Intervener #1) v. International Association of Machinists & Aerospace Workers (Intervener #2)

Unit: "all employees of the respondent at Brantford, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, field service representatives, field engineers, students employed during the school vacation period, and employees in any bargaining unit for which the International Association of Machinists & Aerospace Workers held bargaining rights as of November 4, 1986" (63 employees in unit) (*Having regard to the agreement of the party*)

Number of names of persons on revised voters' list		61
Number of persons who cast ballots	59	
Number of ballots marked in favour of applicant		34
Number of ballots marked in favour of intervener #1		0
Number of ballots marked in favour of intervener #2		25

Applications for Certification Dismissed Without Vote

3310-84-R: Southern Ontario Newspaper Guild (Applicant) v. TV Guide Inc. (Respondent) v. Group of Employees (Objectors) (44 employees in unit)

1669-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Applicant) v. Honeywell Limited (Respondent) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Intervener) (2 employees in unit)

2285-86-R: Canadian Union of Public Employees (Applicant) v. The Ajax, Pickering & Whitby Association for the Mentally Retarded (Respondent) (29 employees in unit)

2505-86-R: International Union of United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. 604783 Ontario Inc., c.o.b. as K. Store (Respondent) (25 employees in unit)

2670-86-R: Hotels, Clubs, Restaurants & Taverns Employees Union, Local 261 (Applicant) v. Fratcom Resources Limited (Respondent) v. Group of Employees (Objectors) (6 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1730-86-R: Sheet Metal Workers' International Association, Local Union 537 (Applicant) v. Naylor Group Incorporated (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		7

2391-86-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Beatrice Foods Inc., Maple Lane Dairy Division (Respondent)

Unit: "all office and clerical employees of the respondent at Kitchener, save and except supervisors, persons above the rank of supervisor, controller, payroll clerk, senior accountant, confidential secretary to the General Manager, laboratory manager, laboratory technicians, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit)

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		14

Applications for Certification Withdrawn

1635-85-R: The Canadian Union of Public Employees (Applicant) v. Metropolitan Separate School Board (Respondent) v. Ontario Public Service Employees Union (Intervener #1) v. Ontario English Catholic Teachers Association (Intervener #2)

2496-86-R: Ironworkers District Council of Ontario (Applicant) v. Sunezco Steel Ltd. (Respondent)

2506-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Laven Associates Limited (Respondent)

2518-86-R: Labourers' International Union of North America, Local 1059 (Applicant) v. R. Lumley Demolition Inc. and/or The Cadillac Brick Company of Canada Limited (Respondent)

2564-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Whitecap Pools Ltd. Hollingworth Drain Services (Respondent)

2652-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. McRobert Spring Ltd. (Respondent)

2793-86-R: Canadian Union of Public Employees (Applicant) v. The Nipissing District Roman Catholic Separate School Board (Applicant) v. The Nipissing District Roman Catholic Separate School Board (Respondent)

2796-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Glen White Industries Limited (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1635-86-FC: Graphic Communications International Union, Local 466 (Applicant) v. Nor Baker Industries, CB Packaging Division (Respondent) (*Dismissed*)

1636-86-FC: Graphic Communications International Union, Local 466 (Applicant) v. Nor Baker Industries, Merry Packaging Division (Respondent) (*Dismissed*)

2082-86-FC: Ontario Public Service Employees Union (Applicant) v. Juvenile Detention (Niagara) Inc. (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0497-84-R: Canadian Paperworkers' Union, Locals 36, 311 & 1112 (Applicants) v. Somerville Belkin Industries Limited, Tencorr Packaging Inc., Belkin Packaging Ltd., and Canadian Folding Cartons Limited (Respondents) (*Withdrawn*)

1384-86-R: Ontario Council of the International Brotherhood of Painters & Allied Trades and the International Brotherhood of Painters & Allied Trades, Local 205 (Applicants) v. J & A Decorating & Painting Ltd., Sandra F. Bozzo c.o.b. as Supreme Decorating & Painting, 655789 Ontario Limited (Respondents) (*Granted*)

1965-86-R: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Applicant) v. Skyline Hotel Toronto and Country Gold Enterprises (Respondents) (*Granted*)

2348-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Venture Mechanical Contractors Inc. and Veri-Therm Limited (Respondents) (*Granted*)

2580-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. IC Custom Woodworking & Renovations Inc. and Woodbridge Custom Kitchens & Woodworking Inc. (Respondents) (*Granted*)

2646-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Architectural Contracting, D. M. Architectural Contracting Limited, and Monaco General Interior Contracting Inc. (Respondents) (*Withdrawn*)

2654-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Applicant) v. Dietrich Mechanical Systems Ltd. and Pal Plumbing (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1384-86-R: Ontario Council of the International Brotherhood of Painters & Allied Trades and the International Brotherhood of Painters & Allied Trades, Local 205 (Applicants) v. J & A Decorating & Painting Ltd., Sandra F. Bozzo c.o.b. as Supreme Decorating & Painting, 655789 Ontario Limited (Respondents) (*Dismissed*)

1994-86-R: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Applicant) v. 654805 Ontario Limited, c.o.b. as the New York Hotel (Respondent) (*Granted*)

2348-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Venture Mechanical Contractors Inc. and Veri-Therm Limited (Respondents) (*Granted*)

2579-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. IC Custom Woodworking & Renovations Inc. and Woodbridge Custom Kitchens & Woodworking Inc. (Respondents) (*Granted*)

2655-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Applicant) v. Dietrich Mechanical Systems Ltd. and Pal Plumbing (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1208-84-R: William E. Rankin (Applicant) v. Retail, Wholesale & Department Store Union AFL-CIO-CLC, Local 414 and Mr. Nick Giannini (Mr. Grocer) (Respondents) v. Dominion Stores Limited (Intervener) (*Dismissed*)

0276-86-R: Alex Nigro (Applicant) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener) (*Dismissed*)

1248-86-R: Rondalyn Brown/Erland Dymont (Applicants) v. Canadian Union of Public Employees (Respondent)

Unit: "all employees of the Regional Municipality of Hamilton-Wentworth (Heritage Village) in the Regional Municipality of Hamilton-Wentworth save and except curator, superintendent and persons above such ranks" (2 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

1558-86-R: Don Darlington (Applicant) v. International Woodworkers of America (Respondent) v. Weber Costello of Canada Limited (Intervener) (*Withdrawn*)

1578-86-R: Abilio Nunes (Applicant) v. International Woodworkers of America (Respondent) (*Granted*)

1682-86-R: Scott G. Foss/Carlos Couto (Applicants) v. International Union of Operating Engineers, Local 796 (Respondent)

Unit: "all employees of Marcil Trust Company at 130 Bloor Street West in Metropolitan Toronto engaged in building maintenance and mechanical maintenance, save and except superintendents, persons above the rank of superintendent, office staff, persons regularly employed for not more than 24 hours per week, persons engaged in contract cleaning service and security, and students employed during the school vacation period" (2 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

1768-86-R: Valerie C. Wright (Applicant) v. Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Respondent) v. West Hill Tavern (Intervener) (*Dismissed*)

2060-86-R: Carol Rouse (Applicant) v. Hotel Employees Restaurant Employees Union - Local 75 of the Hotel Employees', Restaurant Employees' International Union (Respondent) v. 470469 Ontario Limited, c.o.b. as Golden Griddle Restaurant (Intervener) (*Granted*)

2205-86-R: Sami George Izraii (Applicant) v. Christian Labour Association of Canada (Respondent) v. Sarnia Cabinets Ltd. (Intervener)

Unit: "all employees of the intervener employed in Sarnia, Ontario save and except foremen, persons above the rank of foreman, office and sales staff" (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	11

2258-86-R: Cheryl Morris (Applicant) v. United Food & Commercial Workers International Union (Respondent) (*Granted*)

2274-86-R: Filomina Basile (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. The Pastry Place Ltd. (Intervener) (*Granted*)

2304-86-R: Warren Ortlieb (Applicant) v. Teamsters Union Local 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) (*Granted*)

2329-86-R: Brian Murray (Applicant) v. United Steelworkers (Respondent) v. Canadian Grinding Wheel Company (Intervener) (*Withdrawn*)

2432-86-R: The Employees of The London Soap Company Limited (Applicants) v. London & District Service Workers Union, Local 229 (Respondent) (*Dismissed*)

2248-86-R: Joanne L. Pasquarelli (Applicant) v. C.U.P.E., Local 1281 (Respondent) v. Varsity Publications (Intervener) (*Granted*)

2454-86-R: Jonas Geguzis, Evelyn McNamara (Applicants) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Respondent) v. Brimac Anodizing (1985) Limited (Intervener) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2833-86-U: Cooper Construction Company Limited (Applicant) v. Toronto & Central Ontario Building & Construction Trades Council, Carpenters Local 675, L.W. Ballentine, G. Simone (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2536-86-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Cancoil Thermal Corporation (Respondent) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2795-84-U: United Steelworkers of America (Complainant) v. Shaw-Almex Industries Limited (Respondent) v. Group of Employees (Interveners) (*Granted*)

1844-85-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Mellows (Stoney Creek) Corporation (Respondent) (*Dismissed*)

2854-85-U: Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Synco Timber Limited, Sylvor Limitee, Mr. Roger Paquin (Respondents) (*Granted*)

0424-86-U: The United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Complainant) v. Morewood Industries Limited (Respondent) (*Granted*)

05331-86-U: Service Employees International Union (Complainant) v. Parnell Foods (1981) Limited (Respondent) (*Withdrawn*)

0534-86-U: Textile Processors, Service Trades, Health Care, Professional & Technical Employees, Local 351 (Complainant) v. Ridgewood Industries Ltd. (Respondent) v. Group of Employees (Objectors) (*Granted*)

0559-86-U: Labourers' International Union of North America, Local 183 (Complainant) v. Bramalea Limited, Apollo 8 Maintenance Services Limited and Angus Consulting Management Limited (Respondents) v. Fidinam (Canada) Limited (Intervener) (*Granted*)

0598-86-U: United Steelworkers of America (Complainant) v. Blackwood Hodge Equipment Limited (Central Division Sudbury Branch) (Respondent) (*Withdrawn*)

0601-86-U: Jaspal Samra (Complainant) v. Toronto Motion Pictures Projectionists, Local 173, The International Alliance Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada (Respondents) (*Withdrawn*)

0689-86-U: International Union of Operating Engineers, Local 772 and Eugene Ingram (Complainants) v. The Brantford General Hospital (Respondent) v. Service Employees' International Union, Local 204 (Intervener) (*Withdrawn*)

0753-86-U: Employees of Cara Operations Limited Flight Kitchens #1 & #2, Malton (Complainants) v. The Hotel Employees, Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union A.F.L. (CIO:CLC:OFL) and Cara Operations Limited (Respondents) (*Withdrawn*)

0850-86-U: Canadian Paperworkers' Union (Complainant) v. Specialized Packaging Products Limited (Respondent) (*Granted*)

1206-86-U: Carmelo Pelleriti (Complainant) v. Hotel & Restaurant Employees' & Bartenders' International Union (Respondent) v. Cara Operations Limited (Intervener) v. Ministry of Labour (Intervener) (*Granted*)

1207-86-U: Canadian Paperworkers' Union (Complainant) v. Revlon Canada Inc. (Respondent) (*Withdrawn*)

1222-86-U: The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Complainant) v. Highland Equipment Limited (Respondent) (*Granted*)

1318-86-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. 659402 Ontario Limited c.o.b. as Anderson's City Farm Valu-Mart (Respondent) (*Granted*)

1398-86-U: Brewery, Malt & Soft Drink Workers, Local 304 (Complainant) v. The Upper Canada Brewing Company (Respondent) v. Group of Employees (Objectors) (*Granted*)

1538-86-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. James Taylor Fishery Ltd. and James Taylor (Respondents) (*Dismissed*)

1546-86-U: Mr. Andre E. Lavictoire (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Respondent) v. Robert B. Somerville Co. Ltd. (Intervener) (*Dismissed*)

1620-86-U: Energy & Chemical Workers Union (Complainant) v. Petro-Canada Products Inc. (Respondent) (*Withdrawn*)

1718-86-U: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Elgin Handles Ltd. (Respondent) (*Withdrawn*)

1720-86-U: John M. Naroski (Complainant) v. United Steel Workers of America (Respondent) (*Withdrawn*)

1766-86-U: Barry Dennison (Complainant) v. Pinkerton's of Canada Ltd. and Jacques Charpentier (Respondents) (*Withdrawn*)

1964-86-U: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Complainant) v. Skyline Hotel Toronto and Country Gold Enterprises (Respondents) (*Granted*)

1978-86-U: Eric Modopoulos (Complainant) v. Teamsters Local 1247, Chemical, Energy & Allied Workers (Respondent) v. Victory Soya Mills, Division of Central Soya of Canada Ltd. (Intervener) (*Withdrawn*)

1980-86-U: Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Easy Enterprises Inc. (Respondent) (*Withdrawn*)

1995-86-U: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Complainant) v. 654805 Ontario Limited, c.o.b. as the New York Hotel (Respondent) (*Granted*)

2083-86-U: Randy Sayles (Complainant) v. Wilson Truck Lines and The Canadian Union of Drivers & General Workers (Respondents) (*Granted*)

2152-86-U: The United Paperworkers International Union and International Representative Frank Hurley (Complainants) v. Papermasters, a division of The MECO Group Inc., and Mr. Guy Melton (Respondents) (*Withdrawn*)

2244-86-U: United Steelworkers of America (Complainant) v. Royal Tire Service Ltd. (Respondent) (*Withdrawn*)

2248-86-U: Labourers' International Union of North America, Local 183 (Complainant) v. Globfin Developments Ltd. (Respondent) (*Withdrawn*)

2335-86-U: Dante Gulino (Complainant) v. International Association of Machinists & Aerospace Workers (Local 1295) (Respondent) (*Withdrawn*)

2382-86-U: United Food & Commercial Workers International Union, Local 633 (Complainant) v. Morrison's Meat Packers Limited (Respondent) (*Withdrawn*)

2411-86-U: Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261 (Complainant) v. Talisman Motor Inn and W. Ross Sansom, General Manager (Respondents) (*Withdrawn*)

2429-86-U: Retail, Wholesale & Department Store Union (Complainant) v. Beatrice Foods (Ontario) Limited, Maple Lane Dairy Division (Respondent) (*Withdrawn*)

2440-86-U: The Sault Ste. Marie Typographical Union, No. 746 (Complainant) v. The Sault Star, a division of Southam Inc. (Respondent) (*Withdrawn*)

2470-86-U: Graphic Communications International Union, Local 500-M (Complainant) v. Data Business Forms (Don Mills Division) (Respondent) (*Withdrawn*)

2510-86-U: Francois J. Cleroux and Denis Parisien (Complainants) v. Association des Employes de Conseil des Ecoles Separees de Carleton (Respondent) (*Withdrawn*)

2566-86-U: Service Employees Union, Local 478 (Complainant) v. Northern Communication Services Ltd. (Respondent) (*Withdrawn*)

2588-86-U: Service Employees Union, Local 663 (Complainant) v. Lennox & Addington Hospital paramedical Employees, Local 663 (Respondent) (*Withdrawn*)

2599-86-U: Annunziata Tommasino (Complainant) v. Vince Macarone (Respondent) (*Dismissed*)

2658-86-U: Canadian Paperworkers' Union (Complainant) v. C-Tech Ltd. (Respondent) (*Withdrawn*)

2675-86-U: George Geroux (Complainant) v. International Brotherhood of Electrical Workers, Local 1788 (Respondent) (*Withdrawn*)

2676-86-U: Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261 (Complainant) v. Four Seasons Hotel and James Gorda, Executive Assistant Manager (Respondents) (*Withdrawn*)

2691-86-U: Agostino Fiore (Complainant) v. Algoma Steel Corp. and U.S.W.A., Local 2251 (Respondents) (*Dismissed*)

2706-86-U; 2707-86-U: Canadian Union of Public Employees (Complainant) v. Saga Canadian Management Services Limited (Respondent) (*Withdrawn*)

2711-86-U: David Alexander Purdy (Complainant) v. Amalgamated Clothing & Textile Workers Union, Local 1305 (Respondent) (*Withdrawn*)

2772-86-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Dougherty's Meats Limited (Respondent) (*Withdrawn*)

2738-86-U: Everette Chapelle (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) (*Withdrawn*)

2823-86-U: Lee B. Bowen (Complainant) v. G.W. Martin Veneer's Ltd., and International Woodworkers of America (Respondents) (*Withdrawn*)

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2767-86-U: United Food & Commercial Workers Union, Local 175 (formerly Local 409) (Applicant) v. Birchwood Terrence Nursing Home (Respondent) (*Withdrawn*)

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2491-86-M: Mr. Brian Feere (Applicant) v. Cement, Lime, Gypsum & Allied Workers, a division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers and its Local 576 and its President, Ms. Joan Gilchrist (Respondent Trade Union) v. Hamilton Automatic Vending Company Limited (Respondent Employer) (*Dismissed*)

2522-86-M: Joyce Bruinsma (Applicant) v. Service Employees International Union, Local 204 (Respondent Trade Union) v. Harold & Grace Baker Centre (Respondent Employer) (*Dismissed*)

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1940-85-M: The Corporation of the County of Lambton (Applicant) v. Canadian Union of Public Employees (Respondent) (*Granted*)

2864-85-M: International Union of Operating Engineers, Local 793 (Applicant) v. Arlington Crane Service Limited (Respondent) v. Operating Engineers Employer Bargaining Agency (Intervener) (*Withdrawn*)

2509-86-M: The Sault Ste. Marie Typographical Union, No. 746 (Applicant) v. The Sault Star, a division of Southam Inc. (Respondent) (*Withdrawn*)

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2180-86-OH: International Association of Machinists & Aerospace Workers and its Local 1295, Margaret Pollock, Keith McCulloch (Applicants) v. Gabriel of Canada Limited (Respondent) (*Withdrawn*)

2611-86-OH: Oscar Ducharme (Applicant) v. Latem Industries Limited and Liam Nother (Respondents) (*Withdrawn*)

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0201-86-M: Local 787 of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Applicant) v. J. H. Lock & Sons Limited (Respondent) (*Granted*)

1410-86-M; 2555-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Architectural Contracting, D. M. Architectural Contracting Limited, Monaco General Interior Contracting Inc., Sommantino Developments Inc., and Monaco Developments Inc. (Respondents) (*Granted*)

2157-86-M: United Brotherhood of Carpenters & Joiners of America, Local 594 (Applicant) v. Rome Construction Ltd. (Respondent) (*Granted*)

2422-86-M; 2423-86-M: International Union of Operating Engineers, Local 793 (Applicant) v. Comar Paving Inc. (Respondent) (*Withdrawn*)

2424-86-M: International Union of Operating Engineers (Applicant) v. Newcan Mechanical Limited (Respondent) (*Granted*)

2425-86-M: International Union of Operating Engineers, Local 793 (Applicant) v. Taurus Construction & Marine (Respondent) (*Granted*)

2469-86-M: Alwyn A. Gill (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 242 (Respondent Trade Union) v. Aluminum Mold & Pattern Inc. (Respondent Employer) (*Granted*)

2478-86-M: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. E.K.T. Industries Inc. (Respondent) (*Granted*)

2480-86-M: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Terrence Broome (Respondent) (*Granted*)

2489-86-M: Labourers' International Union of North America, Local 493 (Applicant) v. Roman Plastering & Accoustical Company (Respondent) (*Granted*)

2490-86-M: Labourers' International Union of North America, Local 493 (Applicant) v. Future Forming Co. Ltd. (Respondent) (*Granted*)

2508-86-M: International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. Aardvark Glass Services Limited (Respondent) (*Granted*)

2526-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 463 (Applicant) v. Adamson & Dobbin Ltd. (Respondent) (*Withdrawn*)

2552-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. A-1 Renovations (Respondent) (*Granted*)

2558-86-M: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Domingos Carpenters Contractor, 593601 Ontario Ltd. (Respondent) (*Withdrawn*)

2562-86-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Reinhardt Masonry Limited (Respondent) (*Withdrawn*)

2567-86-M: Labourers International Union of North America, Local 607 (Applicant) v. Cencan Concrete & Tile Limited (Respondent) (*Withdrawn*)

2592-86-M: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. J. A. MacDonald London Ltd. (Respondent) (*Withdrawn*)

2593-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Clarkson Construction Company (Respondent) (*Granted*)

2594-86-M: Labourers' International Union of North America, Local 1059 (Applicant) v. The Consortium Group Limited (Respondent) (*Withdrawn*)

2595-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. J. A. MacDonald London Ltd. (Respondent) (*Granted*)

2625-86-M: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7, Canada (Applicant) v. DeMarinis (D.M.A.) Incorporated (Respondent) (*Withdrawn*)

2638-86-M: Teamsters Local Union No. 230 (Applicant) v. Clarkson Construction Co. (Respondent) (*Granted*)

2656-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Applicant) v. Dietrich Mechanical Systems Ltd. and Pal Plumbing (Respondents) (*Withdrawn*)

2661-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Applicant) v. Kel-Gor Limited (Respondent) (*Dismissed*)

2674-86-M: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7, Canada (Applicant) v. M. Sullivan & Sons (Respondent) (*Withdrawn*)

2685-86-M: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Aldershot Flooring Limited (Respondent) (*Withdrawn*)

2690-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Kafer Holdings Inc., c.o.b. as Hunting Wood Homes, 601492 Ontario Limited, c.o.b. as Hunting Wood Manors (Respondents) (*Granted*)

2716-86-M: Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen, including Local 5 London, Ontario (Applicant) v. London Caulking & Installations (Respondent) (*Granted*)

2752-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Aberdeen Highlands Construction Ltd. (Respondent) (*Withdrawn*)

2753-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. G.L. Trenching Ltd. (Respondent) (*Withdrawn*)

2754-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Celmar Drain & Concrete (Respondent) (*Withdrawn*)

2762-86-M: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Alstate Drywall Systems Limited (Respondent) (*Dismissed*)

2768-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Sanick Construction Ltd. (Respondent) (*Withdrawn*)

2771-86-M: Labourers' International Union of North America, Local 527 (Applicant) v. S. Furtner Masonry Contractors (Respondent) (*Withdrawn*)

2772-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Dilli Carpentry (Respondent) (*Withdrawn*)

2773-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Woodframing Contracting Ltd. (Respondent) (*Withdrawn*)

2777-86-M: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. Dixie Sheet Metal Ltd. (Respondent) (*Withdrawn*)

2779-86-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Bennett & Wright (Respondent) (*Withdrawn*)

2783-86-M; 2784-86-M: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental (Respondent) (*Withdrawn*)

2787-86-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. M.A.K. Enterprises Inc. (Respondent) (*Withdrawn*)

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1799-85-R: United Food & Commercial Workers International Union, Local 409 (Applicant) v. Canada Safeway Limited and Current River Foods Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

2270-86-R: Graphic Communications International Union, Local 500M (Applicant) v. Telfer Packaging Limited (Respondent) (*Dismissed*)

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2134-86-M: International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin Contractor Limited (Respondent) (*Granted*)

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0370-86-R: Walls & Ceilings Contractors Association of Ottawa - Association des Constructeurs de Murs et Plafonds d'Ottawa (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 2041 (Respondent) (*Granted*)

*Ontario Labour Relations Board,
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ONTARIO LABOUR RELATIONS BOARD REPORTS

March 1987



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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Selected decisions of particular reference value are
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NOTICE OF REVISED FORMS

Form 6 (*Notice to Employees of Application for Certification and of Hearing before the Ontario Labour Relations Board*), Form 17 (*Application for Declaration Terminating Bargaining Rights before the Ontario Labour Relations Board*), Form 74 (*Return of Posting before the Ontario Labour Relations Board*), and Form 78 (*Notice to Employees of Application for Certification, Construction Industry, before the Ontario Labour Relations Board*), pursuant to R.R.O. 1980, Reg. 546 have been revoked and new forms substituted by O.Reg. 123/87.

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Petition - Certification - Construction Industry - Representation Vote - Employee absent from work on application date due to injury not included in unit for purposes of the count - Petition found to be voluntary despite fact that petitioner retained same lawyer that represented the employer - Operation of employer suspended during winter season - Vote postponed until employees are employed in the unit

A. VUKOVIC FORMING CO., ANTON VUKOVIC C.O.B. AS; RE L.I.U.N.A., LOCAL 527; RE RICHARD LOOP 311

Petition - Certification - Gap in evidence with respect to physical custody of petition - Failure to adduce direct evidence as to what happened to the petition constituting a material gap in the evidence required to discharge the onus of proving the voluntariness of the petition - Petition given no weight - Certificate issuing

CANADA DRY BOTTLING COMPANY LTD.; RE U.F.C.W.; RE GROUP OF EMPLOYEES 337

Petition - Certification - Practice and Procedure - Petition filed after terminal date by employee who mistakenly believed he was not in the bargaining unit - Description of unit not amended subsequent to posting - Request to extend terminal date denied - Employees had reasonable notice of proceedings - Employer misleading employee as to his status not sufficient grounds to extend terminal date - Petition untimely

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Petition - Termination - First termination application withdrawn - Inquiry into voluntariness of second petition must include consideration of circumstances surrounding first petition - Originator of petition stepping beyond bounds of permissible salesmanship - Employees perceiving originator as linked with management - Application dismissed

IMPERIAL CLEVITE CANADA INC.; RE BERNARD JOHN MOORE; RE I.A.M., LOCAL 1975; RE GROUP OF EMPLOYEES 375

Practice and Procedure - Certification - Construction Industry - Application for certification brought under construction industry provisions - Construction industry provisions subsequently found to not be applicable - Employer alleging that procedural fairness required that application be dismissed - Board following its practice of treating the application as though it had been made under the general provisions

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Practice and Procedure - Certification - Representation Vote - Vote held in part-time and full-time bargaining units - Five employees in part-time unit moving to full-time unit before date vote held but voting in part-time unit - These employees not eligible to vote in either the part-time or the full-time unit - New vote ordered in part-time unit - Voter eligibility rules reviewed

LAPALME NURSING HOME LTD.; RE C.U.P.E.; RE GROUP OF EMPLOYEES

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Practice and Procedure - Certification - Respondent asserting that intervention lacked particulars - Board reviewing its policy respecting sufficiency of particulars - Further particulars ordered

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Pre-Hearing Vote - Bargaining Rights - Certification - Applicant requesting pre-hearing vote - Applicant and respondent have been parties to "agreements" which speak to terms of employment - If applicant already has bargaining rights for employees in unit for which it seeks certification, no outcome of a vote would change those rights - Hearing scheduled so that applicant can show cause why its request for a vote should not be refused

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E.-C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE GROUPS OF EMPLOYEES.....

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Religious Exemption - Applicants members of the Harvester Baptist Church - Applicants found to be sincerely religious persons but beliefs not the cause of the objection to paying union dues - Opposition grounded in social and political views - Exemption not granted where the overall thrust of the objection is not religious in nature - Application dismissed

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required to set out in writing and in detail a complete statement of its position on compensation issue if parties unable to agree on amount of compensation to be paid grievors

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Representation Vote - Certification - Practice and Procedure - Vote held in part-time and full-time bargaining units - Five employees in part-time unit moving to full-time unit before date vote held but voting in part-time unit - These employees not eligible to vote in either the part-time or the full-time unit - New vote ordered in part-time unit - Voter eligibility rules reviewed

LAPALME NURSING HOME LTD.; RE C.U.P.E.; RE GROUP OF EMPLOYEES 406

Sale of a Business - Respondent insurance company having obligation central to its business as a landlord regarding the provision of cleaning services to its tenants - Cleaning services contracted out for reasons of economy - Bona fide contracting out arrangement and not a sale of a business - Application dismissed

METROPOLITAN LIFE INSURANCE COMPANY; RE I.U.O.E., LOCAL 796..... 413

Settlement - Board will only make a declaration, direction or order pursuant to a settlement if there is express agreement that it do so and if the Board has jurisdiction to do so - Use of phrase "endorse the record" in minutes of settlement discouraged

CONSOLIDATED ALUMINUM (MARITIMES) LTD.; RE P.A.T., LOCAL 1824; RE CONSOLIDATED ALUMINUM & GLASS CORP. 350

Termination - Petition - First termination application withdrawn - Inquiry into voluntariness of second petition must include consideration of circumstances surrounding first petition - Originator of petition stepping beyond bounds of permissible salesmanship - Employees perceiving originator as linked with management - Application dismissed

IMPERIAL CLEVITE CANADA INC.; RE BERNARD JOHN MOORE; RE I.A.M., LOCAL 1975; RE GROUP OF EMPLOYEES 375

Unfair Labour Practice - Certification Where Act Contravened - Interference in Trade Unions - Letter sent by president of respondent suggesting link between unionization and possible loss of jobs going beyond boundaries of freedom of speech - Lead hands not excluded from bargaining unit but acting on behalf of management in violation of sections 64 and 66 - Lay-offs partly motivated by anti-union animus - Employer involvement in employee association designed to diminish appeal of a union violation of Act - Union certified pursuant to section 8

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Unfair Labour Practice - Duty of Fair Representation - No collective agreement in effect when grievance filed - Preliminary objection to Board jurisdiction dismissed - Fair representation duty continues after expiry of agreement - One and one half year delay in processing complainant's grievance that employer did not recall complainant during layoff - No explanation for delay - Non-caring attitude constituting arbitrary conduct - Union ordered to process grievance

XERRI, GEORGE; RE LOCAL 112 U.A.W. CANADA..... 444

Unfair Labour Practice - Duty of Fair Representation - Part-time and full-time employees paying union dues according to same formula - Part-time employees paying proportionately more of their wages as dues - Whether dues structure "fair" outside scope of fair representation duty - Complaint dismissed

FRY, BRIAN; RE TEAMSTERS UNION, LOCAL 419..... 365

2503-86-R Labourers' International Union of North America, Local 527, Applicant v. Anton Vukovic c.o.b. as A. Vukovic Forming Co., Respondent v. Richard Loop, Objector

Certification - Construction Industry - Petition - Representation Vote - Employee absent from work on application date due to injury not included in unit for purposes of the count - Petition found to be voluntary despite fact that petitioner retained same lawyer that represented the employer - Operation of employer suspended during winter season - Vote postponed until employees are employed in the unit

BEFORE: *J. Harold Brown, Q.C., Vice-Chair, and Board Members J. Wilson and H. Kobryn.*

APPEARANCES: *David Strang, Manuel Martins and Andy Roy for the applicant; Ronald Petersen and Anton Vukovic for the respondent; Richard Loop and Ronald Petersen for the objector.*

DECISION OF J. HAROLD BROWN AND J. WILSON; March 18, 1987

1. By a decision dated January 23, 1987 another panel of the Board found the instant application for certification to be an application within the meaning of section 119 of the *Labour Relations Act* and an application made pursuant to section 144(1) of the Act.

2. In its decision of January 23, 1987, the Board further found that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

3. Paragraphs 6, 7 and 8 of the Board's decision of January 23, 1987 read as follows:

6. The Board Officer explained to the parties that, in an application for certification made under the construction industry provisions of the Act, the Board counts only those employees who were actually at work in the bargaining unit on the date of making of the application. That is a reference to how the Board usually carries out its mandate under section 7(1) of the Act to "...ascertain the number of employees in the bargaining unit at the time the application was made....". As noted above, the application date was December 4, 1986 in this case. Respondent counsel took the position that the respondent's business was seasonal and, therefore, the Board should count the four employees on Schedule "C" who had been laid off prior to the application date and who were not at work on the application date and the employee listed on Schedule "D", who was absent on the date of application for reasons other than lay-off, for purposes of ascertaining the number of employees in the bargaining unit at the time the application was made. Section 7(2) also requires the Board to ascertain the number of employees in the unit who are members of the trade union. The Board makes this determination as of the terminal date which has been set for the application, in this case December 16, 1986.

7. The officer informed the parties that, were the Board to follow its usual policy of counting only those employees who were actually at work on the date of the application, there would be six employees in the unit and, of those six, four were members of the applicant within the meaning of section 1(1)(l) of the Act on December 16th. Thus, as of December 16th, the applicant had more than fifty-five per cent of the employees who were at work in the bargaining unit on December 4th as its members and this would be sufficient for the Board, in ordinary circumstances, to certify the applicant without a representation vote. In this application, however, in addition to the issue raised by the respondent, there has been filed with the Board a timely,

written statement from an employee in the bargaining unit who is opposed to the application. Should the Board find this statement to express the voluntary wishes of the employee, it would raise doubt whether the applicant continues to have the support of a sufficient number of the employees who were employed by the respondent on the application date and were members of the applicant on the terminal date for the Board to certify the applicant without a representation vote. That circumstance would cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken. It will be necessary, therefore, for the Board to inquire into the origin and circulation of the statement and a hearing will be held for that purpose.

8. Having regard to all of the foregoing, the Board directs the Registrar to list this application for hearing before the Board on the earliest available date for the purpose of receiving the evidence and representations of the parties respecting:

- (1) whether the Board should include, for purposes of determining who was at work on the making of this application, those employees who were not at work in the bargaining unit on the date of the application; and
- (2) the circumstances concerning the origin and signing of the statement filed in opposition to the application.

4. With respect to the issue set out in paragraph 8(1) above, counsel for the applicant submitted that based on the past jurisprudence of the Board, as it relates to the construction industry, only the employees who were at work on the date of application should be included in the bargaining unit for purposes of the count. In support of his position, counsel relied on the decision of the Board in the *Smith Construction Company, Arnprior, Limited* case [1984] OLRB Rep. March 521 and the recent decision of the Board dated January 30, 1987 in *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 which he argued lends support to the earlier decision. Counsel for the respondent agreed that, based on the Board's policy, the four employees shown in Schedule C, who were not at work on December 4, 1986 by reason of lay-off, should not be included in the employees' list for purposes of the count. However, counsel argued that Bruno Pamic, who is shown in Schedule D as not being at work on the date of the application, should be included for purposes of the count. Pamic's last day of work is shown as September 15, 1986, the reason for his absence being injury, and his expected date of return as the spring of 1987. Counsel submitted that since Pamic was being paid workmen's compensation by reason of his injury, he should be regarded as an employee of the respondent on the date of the application even though he was not at work on the date of the application.

5. The Board rejected the argument of counsel for the respondent with respect to Bruno Pamic and accepted that of counsel for the applicant. In doing so, the Board accepts the rationale set out in *Gilvesy Enterprises Inc.*, *supra*, paragraph 21, which read:

21. In making our determination, we considered the work performed by the persons whose status was in dispute in these proceedings both on the date of application and during a period prior to that date. However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" has tended to

result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create, as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his time doing on the date of application; or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

6. The second issue, in respect of which the instant application was set down for hearing, as set out in paragraph 8(2) of the Board's decision of January 23, 1987, is the circumstances concerning the origin and signing of the statement filed in opposition to the application by Richard Loop, the employee objector who filed a statement of desire expressing opposition to the application. The statement was sent by registered mail dated December 15, 1986 and was received by the Board on December 17, 1986. The terminal date set by the Registrar for the application is December 16, 1986. Accordingly, Mr. Loop's statement of desire is timely. His evidence, which was the only evidence adduced relating to the statement, is set out below.

7. Loop was asked to sign an application for membership in Local 527 by a union representative, Manuel Martins, on December 4, 1986. Loop signed an application on that date and paid a \$1.00 initiation fee. (The application for membership was submitted by the applicant in support of its application.) At the end of his working day on December 4, 1986, sometime between noon and 6:00 p.m., he went to the office of the applicant union and asked a secretary who was present for his membership card. She replied that he would have to pay an additional \$35.00 in order to get a membership card. Loop felt embarrassed and humiliated by the secretary's response, as he thought that he had joined the union by the payment of the \$1.00 initiation fee. It was this incident that triggered Loop's decision to file his statement of desire in opposition to the application on December 15, 1986 some eleven days later.

8. In cross-examination, Loop admitted that on December 5, 1986, the day following his encounter with the secretary, Martins telephoned him and asked Loop to come into the office and discuss the matter of his membership with him. Loop also conceded in cross-examination that Martins did say on the telephone something about the secretary making a mistake and that the request of \$35.00 was made in error. Loop did not accept Martins' invitation and did not see or talk to him prior to filing his statement in opposition to the application.

9. Loop's explanation for the lapse of time in filing his statement was that he was only aware he could do so when he received by mail a Form 78, Notice to Employees of Application for Certification, Construction Industry. According to the Board's records, three such notices were sent to the respondent and to four individual employees, including Loop, on December 8, 1986. Loop did not know when he received the notice. However, the respondent's Return of Posting card states that Anton Vukovic, the President of the respondent, posted the Notice to Employees at 5:00 p.m. on December 11, 1986. Loop presumably received his notice at approximately the same time. In any event, according to Loop's testimony, it took him a couple of days to understand the contents of the notice, i.e., that he could send a statement to the Board saying that he was opposed to the application. When he came to this realization, he went to a local post office and,

using post office paper and envelope, he wrote out his statement opposing the union and sent it to the Board by registered mail. His evidence is that he did not discuss his action in sending the statement with Vukovic at any time prior to or after doing so. Vukovic would appear to be the only manager.

10. Loop's evidence is that the last day that he worked was on December 5, 1986. In fact, that was the last day of work for the season and all of the six employees including himself were laid-off on that day. They knew in advance that such would be the case. According to Loop, Vukovic was not in the yard on the last day of work and did not hand out the separation slips to Loop or the other employees. Rather, it was given to him by one of the other employees. The form indicated that the respondent would be recalling Loop to work when its operations recommenced in the spring.

11. Loop testified that he retained the services of the same lawyer who was representing the respondent to act for him at the Board hearing on February 20, 1987 just before the commencement of the hearing. Loop's evidence is that he did so to ensure that his interests were protected and that he discussed his situation with Mr. Petersen at that time.

12. There is no evidence before the Board from which it reasonably can be inferred that Loop was motivated or influenced by management of the respondent to file his statement of desire expressing opposition to the application. We find this to be the case notwithstanding that Loop retained the respondent's lawyer to act for him at the Board hearing on February 20, 1987. In light of the above finding, the basis for Loop's action in filing his statement is not a relevant consideration. In the result, we are satisfied that the statement of desire represents a voluntary expression of his true wishes.

13. In these circumstances, normally the Board would have directed the conduct of a representation vote in exercising its discretion under section 7(2) of the Act. However, in the particular circumstances of this case it is impossible to conduct a vote at this time because there are no employees employed in the bargaining unit. The employer is not employing any employees at the present time because operation of its business has been suspended for the winter season.

14. In the construction industry, it has been the Board's invariable practice in these circumstances to postpone the conducting of a vote until such time when employees are employed in the bargaining unit. See, *Clairson Construction Company Limited*, [1967] OLRB Rep. Sept. 606 and decisions cited therein.

15. In accordance with this practice therefore, the Board defers the taking of a representation vote in this matter to a future date. The respondent is directed to notify the Registrar of the Board without delay, when the respondent employs any employees in the bargaining unit. If the existence of employees in the bargaining unit comes to the attention of the applicant, it may also report that fact to the Registrar.

DECISION OF BOARD MEMBER H. KOBRYN;

1. I cannot agree with the majority on the voluntariness of this statement of desire because of the recorded evidence at the hearing. When the petitioner was examined by the Board about the statement of desire, one of the questions he was asked was:

"Have you had any communication or conversation with management"?

Petitioner - "You mean Mr. Vukovic"?

Board - "Yes".

Petitioner - "No, but it's kind of funny to refer to him as management".

The above exchange indicates to me that a close relationship exists here. After the Board finished its questions, the petitioner was then questioned by his own counsel who is also here representing the employer. At the outset of his cross-examination, the following questions were asked:

Board - "Were you at work on December 4, 1986"?

Petitioner - "Yes".

Board - "Were you approached to join the union"?

Petitioner - "Yes".

Board - "Who approached you"?

Petitioner - "The two gentlemen here at this hearing".

Board - "What was said to you"?

Petitioner - "Would I like to join the union for \$1.00. I said sure".

Board - "What did you do then"?

Petitioner - "I went to the union office to get my union card after the end of the day, and was told by the secretary I would have to pay \$35.00 because that's what the Constitution says".

This very occurrence highlighted by his counsel does not seem to me as being a natural sequence, that on the very day you sign an application to become a member of the union you would go down to the union office to get your union card.

2. Then the incident with the secretary and the request for payment of \$35.00 as per Constitution; using this incident as his apparent sole reason for filing of the statement of desire against the union some eleven days later.

3. When questioned by the union counsel whether he was contacted by the union organizer who signed him up soon after he left the union office and advised him that the attempted charge of \$35.00 for union membership was an error on the part of the secretarial staff, the petitioner admitted he was called by the union organizer, but kept denying that the union organizer mentioned the error but finally and reluctantly answered the following question put to him by union counsel:

"Did he indicate that the secretary was not aware you were coming in and there had been a mistake made by the secretary"?

Petitioner - "I believe he said something like that".

This union office incident would not have seemed unnatural to me if the petitioner had gone to the union office on December 5, 1986 when he was laid-off by his employer. This would have been something natural to do because this union office is also the Union Hiring Hall where unemployed members come to register for work.

4. The additional happening that does not seem to me as being so innocent was the sudden

arrangement by the employer's counsel to represent the petitioner at this hearing and to highlight the union office incident.

5. Also the petitioner's continuous refusal to answer questions put to him by union counsel, whether or not he had discussed the evidence he was going to give to this Board, with his counsel this morning. This very question brought vehement objections from the said counsel, in that the questions asked was client-counsel privileged and that the petitioner did not have to answer it. The Board had to overrule the petitioner's counsel's objections and order the witness to answer the question. The answer was not forthcoming until he was told by his counsel that he had answered some.

6. I found the witness's continuous denials of questions as to whether he had talked to his employer from the time he signed up with the union on December 4, 1986, followed by his subsequent lay-off on December 5, 1986 and up to the very day of this hearing, even if just to discuss his lay-off and his possible recall in the spring, as being simply not credible. Especially when you consider his first statement when he was asked if he had any communication or conversations with management.

7. All the happenings referred to above makes me seriously doubt that the petitioner's change of heart was truly voluntary and without employer influence.

8. I would have dismissed this statement of desire as not being voluntary and certified the union as bargaining agent for all the construction labourers.

2789-86-R; 2790-86-R; 2791-86-R; 2792-86-R United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Applicant v. **Brown Boveri Howden Inc.**, Respondent v. Electrical Power Systems Construction Association, Intervener #1 v. Mechanical Contractors Association of Ontario, Intervener #2; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Applicant v. **Nicholls Radtke Ltd.**, Respondent v. Electrical Power Systems Construction Association, Intervener #1 v. Mechanical Contractors Association Ontario, Intervener #2; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Applicant v. **State Contractors Inc.**, Respondent v. Electrical Power Systems Construction Association, Intervener #1 v. Mechanical Contractors Association Ontario, Intervener #2; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Applicant v. **Watts & Henderson Ltd.**, Respondent v. Electrical Power Systems Construction Association, Intervener #1 v. Mechanical Contractors Association Ontario, Intervener #2

Bargaining Rights - Certification - Construction Industry - On date applications filed, none of the respondents had any employees in any of the bargaining units applied for in any of the applications - Applicant already held bargaining rights for all of the employees for whom it sought to

be certified - Board explaining construction industry certification applications - Application for certification not an appropriate vehicle for obtaining clarification of what bargaining rights the applicant already holds for which employers pursuant to the EPSCA and ICI provincial agreements - Applications dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *A. J. Ahee*, *N. W. Meikle* and *C. Burrows* for the applicant; *J. P. Borden*, *J. A. Jackson* and *Chris Doona* for Brown Boveri Howen Inc.; *S. C. Bernardo* and *Richard Westlake* for *Nicholls Radtke Ltd.*; *S. Bernardo* and *Phillip Wiseman* for *Watts & Henderson Ltd.*; no one appearing on behalf of *State Contractors Inc.*; *H. A. Beresford* and *I. Starasts* for intervenor #1; *G. Grossman* for intervenor #2.

DECISION OF THE BOARD; March 18, 1987

1. These four applications for certification pursuant to the construction industry provisions of the *Labour Relations Act* were all filed on January 9, 1987 and came on for hearing together in Toronto on February 25, 1987. Upon hearing the representations of the parties with respect to the issues raised in various replies and interventions filed, the Board orally dismissed all four. The Board's reasons now follow.

2. On the information before the Board, the applicant is a trade union within the meaning of section 1(1)(p) of the Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister pursuant to what is now subsection 139(1)(a) of the Act on April 12, 1978, and subsequently amended on May 14, 1982, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada.

3. In each application, the applicant trade union sought to be certified for a bargaining unit that it described as follows:

All plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices and pipe welders

- 1) in the employ of the Respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and
- 2) in the employ of the Respondent in the electrical power systems sector of the construction industry in the Province of Ontario; and
- 3) in the employ of the Respondent in all other sectors of the construction industry in Board geographic area 9

save and except non-working foremen and persons above the rank of non-working foreman.

4. The Act is structured so that trade unions which, like the applicant, engage in collective bargaining in the industrial, commercial and institutional ("I.C.I.") sector of the construction industry may apply for bargaining units of employees as follows:

- (a) all employees who would be bound by a provincial collective agreement in the ICI sector and, unless bargaining rights for them are already held by a trade union, all other employees in all other sectors

- of the construction industry in at least one of the Board's geographic areas (subsection 144(1)); or
- (b) all employees in all sectors other than the ICI sector of the construction industry in a board area (subsection 144(3)).

The bargaining units requested herein are most like one sought pursuant to subsection 144(1) and are applications for certification within the meaning of section 119 of the Act. Though specifically asked whether it wished to do so, the applicant did not seek to amend any of its four applications.

5. In an application for certification under subsection 144(1) of the Act, there need not be employees who are not represented by any trade union in both the ICI sector *and* in some other sector of the construction industry on the date of application in order for a trade union to be certified as the bargaining agent of the employees in the bargaining unit (see *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729; *Watcon Inc.*, [1981] OLRB Rep. Nov. 1697). However, to be so certified, the employer for which employees a trade union seeks to be certified must have at least two employees in one or the other who are unrepresented, or who are not covered by a collective agreement, or who are covered by a collective agreement which is in its open period when the application is made. Similarly, in an application under subsection 144(3) of the Act, there must be at least two such employees in other than the ICI sector on the date of application. There were no such employees in any of the bargaining units applied for in these four applications. Indeed, the applicant itself already holds the bargaining rights for all of the employees for whom it sought to be certified.

6. The applicant and the intervener Electrical Power Systems Construction Association ("EPSCA") are bound by a provincial agreement effective May 1, 1986 to April 30, 1988 for the electrical power system sector of the construction industry (the "EPSCA Agreement"). All four respondent employers are bound by that provincial agreement. Further, three of the four respondents, namely Nicholls Radtke Ltd., State Contractors Inc., and Watts and Henderson Ltd., are bound by a provincial agreement for the ICI sector effective May 1, 1986 to April 30, 1988 (the "MCAO agreement"). The applicant and the intervener Mechanical Contractors Association of Ontario ("MCAO") are also bound by that provincial agreement. The remaining respondent, Brown Boveri Howden Inc., though apparently not bound by the ICI provincial agreement, employed no non-managerial persons for whom no union held bargaining rights in any sector of the construction industry on the date of the application for certification to which it is the respondent. Consequently, there were no employees affected by any of the four applications for whom no union held bargaining rights on the date of application. Further, the applications were not made during the open periods of the collective agreements that cover the employees affected.

7. In the result, no application to represent employees covered by these agreements would be timely. Accordingly, the employees covered by either provincial agreement would be excluded from the bargaining units applied for in these applications. Therefore, on the date these applications were filed, none of the respondents had *any* employees in any of the bargaining units applied for in any of the applications. There being no employees in any of the bargaining units applied for, all the applications were dismissed.

8. Finally, the Board understood counsel for the applicant to say that his client had brought these applications for certification in order to have the Board clarify what bargaining rights it already holds for which employers pursuant to the EPSCA and ICI provincial agreements. In our view, an application for certification is not an appropriate vehicle for obtaining such a clarification. Indeed, it is difficult to understand why the applicant does not simply ask EPSCA and MCAO which employers those Associations consider are bound by their respective provincial

agreements. Any dispute with respect to that or any other issue concerning the interpretation, application or administration of either provincial agreement is properly dealt with either in accordance with the grievance and arbitration provisions of the provincial agreement concerned, or by referring a grievance with respect to the dispute to the Board pursuant to section 124 of the Act.

1712-86-U; 1786-86-R United Food and Commercial Workers International Union, Local 1000A, Complainant v. **Cambridge Canadian Foods Inc.**, Respondent; United Food and Commercial Workers International Union, Local 1000A, Applicant v. Cambridge Canadian Foods Inc., Respondent v. Group of Employees, Objectors

Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Letter sent by president of respondent suggesting link between unionization and possible loss of jobs going beyond boundaries of freedom of speech - Lead hands not excluded from bargaining unit but acting on behalf of management in violation of sections 64 and 66 - Layoffs partly motivated by anti-union animus - Employer involvement in employee association designed to diminish appeal of a union violation of Act - Union certified pursuant to section 8

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. A. Ronson* and *D. Patterson*.

APPEARANCES: *Bram Herlich*, and others for the applicant/complainant; *Gordon J. Weir*, *Malcolm Garner* and *Tom Osmond* for the respondent; *Robert A. Stewart* for the objectors.

DECISION OF JUDITH McCORMACK, VICE-CHAIR, AND BOARD MEMBER D. PATTERSON; March 25, 1987

1. This is an application for certification in which the applicant has invoked section 8 of the *Labour Relations Act*. Upon the agreement of the parties, the Board ordered that this application and a complaint filed by the applicant under section 89 of the Act be consolidated for hearing.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties and the manner in which the Board generally describes bargaining units of this type, the Board finds that all employees of the respondent in Cambridge, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.
4. In accordance with the Rules of Practice respecting applications for certification, the respondent filed a list of employees. The applicant took the position that four people on the list, Bonnie Gmelin, Randy Hunt, Vaughn Hussey and Michelle Penney should be excluded from the bargaining unit by virtue of section 1(3)(b) of the *Labour Relations Act*. Because the question of the status of these individuals touched upon issues raised in the section 89 complaint and the section 8 application, the Board heard evidence with respect to their duties and responsibilities for the purpose of making a finding with respect to their inclusion in the bargaining unit. There were five

other challenges to the list relating to the exclusion of five grievors who were laid off, allegedly in violation of the Act, which the parties anticipated would be resolved by the disposition of the section 89 complaint. Although a petition purporting to be signed by a number of employees in opposition to the union was filed, it was not pursued by the parties except to the extent that it related to the circumstances of the section 8 application or the section 89 complaint. However, the petitioners were represented by counsel and participated fully in the hearings.

5. During the course of these proceedings, the Board heard evidence from 18 witnesses and received 12 exhibits during seven days of hearings. In making the findings of fact set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the submissions of the parties concerning that evidence, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case and what inferences may reasonably be drawn from the totality of the evidence. The following are the salient facts in this matter.

6. The respondent operates a specialty food manufacturing plant in Cambridge, Ontario in which approximately 36 people are employed. The company was established in the summer of 1985, when Malcolm Garner, the respondent's president, and Robert Bras, the respondent's chairman, bought the building and land from a food company which had gone into receivership. It was clear from the evidence that Mr. Garner effectively manages the production aspect of the company with the assistance of a plant manager, Tom Osmond. Below Mr. Osmond are five supervisors or lead hands, four of whom are the individuals described above as challenged by the applicant. Although Mr. Garner admitted that these five individuals were previously referred to as "supervisors" and were only renamed "lead hands" after he received the application for certification, we will be employing the term "lead hand" in referring to them in this decision because it is more consistent with our findings with respect to their duties and responsibilities.

7. At the end of August 1986, Charlotte Hussey, an employee of the respondent, contacted the applicant expressing interest in union representation. As a result, Ms. Hussey and her common-law husband, Vaughn Hussey, who also works for the respondent, met with Kevin Benn and Pearl McKay on August 28, 1986. Mr. Benn and Ms. McKay are employed by the applicant. The four discussed the pros and cons of unionization, the legal rights of employees and the procedure for signing up union members. At that time, Mr. Hussey was told not to get involved in the campaign because, as a lead hand, he might be a member of management. A union meeting was then scheduled for September 3rd.

8. On September 2nd, Mr. Garner became aware that a union campaign was in progress when he was provided with a copy of Ms. McKay's business card. In his own words, he was "dumb-struck", "crushed", and "initially very hurt". On the afternoon of the following day, Mr. Osmond told Randy Hunt and Mr. Hussey that he knew there was a union meeting that night and that as both lead hands were members of management, they should not get involved. Some time later that day, Mr. Hussey bumped into Mr. Garner in the test kitchen. Mr. Garner asked him if he had heard about the union. When Mr. Hussey replied in a non-committal manner, he told Mr. Hussey that the reason the company was getting work was because the plant was not unionized and thus there was no chance of a strike interrupting the supply of products to customers.

9. At the end of that same work day, Bonnie Gmelin, another lead hand, approached a group of four employees in the women's washroom and told them that she wanted to pass on a message. She advised them to "be aware" of what they were doing that night, and said that the

company might lose two major contracts if they became unionized because the only reason they had obtained the contracts was that the plant was non-union. Ms. Gmelin then went into the cafeteria and made the same announcement to eight other employees. During the same two days, Ms. Gmelin approached a cluster of employees talking on the shop floor and announced that there would be no talk of the union on the floor. The day following the union meeting, Mr. Osmond approached another group of employees involved in a discussion of the union, and told them that he could be either nasty or nice. If he saw employees standing around or not attending to their job properly, they would be "gone". Mr. Osmond told the Board that he was trying to impress upon employees that he tried to be reasonable and get people to do things in a reasonable manner, but that he could also be a disciplinarian. That same day, Mr. Osmond told another employee, Jeffrey Hermer, that he would lose respect for anyone who was responsible for bringing a union into the plant.

10. On the next day Mr. Garner asked Mr. Hussey if he had heard anything more about the union. He then told Mr. Hussey that whatever was happening, it must have been started by someone the company had hired recently. On Saturday, September 6th, Mr. Garner arranged for each employee to receive a letter by courier at their home which read as follows:

A PERSONAL MESSAGE FROM MALCOLM GARNER.

I am writing this to you to explain how I feel a union would affect our company and how it would affect the future of all of us.

The law gives every employee the *right to choose* whether or not to join a union. It is against the law for anyone to interfere with your *free* exercise of that choice. (You should also be aware that a union can be certified without a vote of all employees.) At the same time you should be aware that, if a union is voted in, even those employees who may not want to join will have to pay union dues.

I am personally concerned that there is even consideration of a union at our company. I think we have developed a fine working relationship like a family where we can work our own problems out. At the same time, I can see where there is some misunderstanding, and would like you to look at what a union can do that we have not already shown a willingness to do on our own.

The law allows the Union to *promise* you many things. You should recognize however, that the Union can't *guarantee* you that they will be able to deliver any of their promises. (You have only to look at the Burn's and Eaton's situation or any of the companies that have had layoffs, to see how little a union can guarantee!) They cannot guarantee you increased pay or better fringe benefits, working conditions, through negotiations with the company. Please remember that both parties must agree -- if not there is usually a strike -- where no one wins. Do you *really* feel you need to *pay* a third party to negotiate for you? Your company has tried to be fair in the past and has shown a *willingness to listen*.

While the Union can *promise* much, let's look at what we at Cambridge have actually done in the short time we have owned the business -- *without a union*:

- We immediately increased wage rates by substantial amounts and have continued to adjust rates upward -- without any pressure.
- Those of you who have been with us for a while know that we try to provide regular hours for you -- even when we are not busy -- to provide a sense of security.
- We have a clear policy of training our own people and to promoting staff from within -- and have tried to recognize special efforts.
- We have provided financial assistance in education programmes to help our staff who want to get ahead.

- We have worked with you to identify ways to make the job environment more pleasant – for example, the lunch room, women’s change room and our Christmas party – which was great fun for all of us as a family.

There is still much to be done but we are a young and growing company. I think that the points above show our intention to continually improve and that we can do it together – without a third party!

Over the past 15 months, we have worked together to build a first class specialty food manufacturing operation. We have done this by establishing a very positive “family type” atmosphere. This atmosphere has been noted by our new customers – who selected us to make their product because of their confidence in our ability, our people and continuity of supply. Should you decide for a union, much of this could be lost – seriously jeopardizing our existing and future business.

Say no! to the union and let’s work together to make this a strong and secure company that we can all be proud of!

11. Michelle Penny is a lead hand who was replaced by her sister, Denise Penny, during a recent maternity leave. At a baby shower on the following weekend which was attended by a number of employees, either Michelle Penney or Denise Penney initiated a discussion in the presence of employees Betty Hussey and Cecelia Power with respect to the identity of the person or persons initiating the union campaign. Michelle Penney was of the view that Charlotte Hussey was the one who was “the head of it”. Some days later in the plant, Denise Penney told Ms. Power that she knew for sure that Charlotte Hussey had started the union; that the company would close up if a union came in; that she, Denise Penny, would lose her job; and that she would bash Charlotte’s face in because she had car payments to make.

12. On or about September 10, 1986, Debbie Park, another employee, brought a petition into the plant calling for the formation of an employee association (to be distinguished from the petition in opposition to the union subsequently filed with the Board). Initially, she left it in the plant lunchroom for other employees to sign. When three of the people who had previously signed scratched their names off, the petition was retrieved from the cafeteria and Mr. Hunt started circulating it and collecting signatures during working hours. On September 10th or 11th, employees Mary Wright and Ed Howell were approached by Mr. Hunt to sign the petition. Both declined to do so. During the same time period, Ms. Park advised Charlotte Hussey and others at a lunch-break that if they wanted to know more about the employee association, they should speak to Mr. Osmond. Charlotte Hussey asked Ms. Park whether such a discussion was to be on company time, and received an affirmative answer.

13. As a result, shortly thereafter Ms. Hussey went to speak to Mr. Osmond in his office. She asked him what the association was all about, and he advised her that a member of each department would be voted in to represent workers and speak on their behalf if there were any problems. Ms. Hussey suggested to him that if the company was not interested in responding to the concerns of employees, their representatives might be fired. Mr. Osmond assured her that the company would not do that and then pointed out that no union dues were payable to an association. She then returned to work.

14. During this period, Mr. Hussey went into Mr. Osmond’s office and found Mr. Hunt sitting with Mr. Osmond with the petition on the desk in front of them. Mr. Osmond was taking notes.

15. On September 11th or 12th, Mr. Hussey asked for a meeting with Mr. Garner on behalf of employees. A brief meeting was held after work in the plant lunchroom. At that time, Mr. Hus-

sey asked Mr. Garner why he had allowed one lead hand to carry around a petition for an employee association, and permitted another to tell people that their jobs were going to be jeopardized by the union, yet Mr. Hussey had been told to stay out of it. Mr. Garner told him that his hands were tied and that if anyone had any questions he would be in his office. He then left the meeting. The discussion between pro-union and anti-union employees at the meeting subsequently became quite heated. Among other things, Ms. Gmelin spoke strongly against the union and told Charlotte Hussey that employees would have to pay forty to fifty dollars in union dues per month.

16. On September 15, 1986, the applicant filed an unfair labour practice complaint under section 89. This was supplemented by further particulars as events unfolded.

17. On September 16th, Mr. Hunt approached Mr. Howell again to ask him if he was going to sign the petition. Mr. Howell replied that he didn't know. At that point Mr. Osmond entered into the conversation and suggested that Mr. Howell join Mr. Osmond's union and that it wouldn't cost him anything. Mr. Osmond advised the Board that he was collecting money for a lottery at the time and that his remark was made in jest. Mr. Howell declined to sign. On September 10th, Mr. Osmond, again while collecting lottery money, told a number of employees, including Betty Hussey, that he hoped that they won the lottery so that they could pay their union dues.

18. On the following day, Betty Hussey, Mary Wright, Charlotte Hussey, Randy Hall and Ed Howell were told by the employer that they were laid off effective immediately.

19. On September 23rd, Mr. Garner was asked by Mr. Hunt to allow the plant lunchroom to be used for an employee meeting. Mr. Garner agreed. A notice was posted on the bulletin board in the cafeteria and the meeting was held after work that same day. The meeting opened with a brief discussion of the merits of an employee association led by Ms. Park, followed by a show of hands with respect to the formation of an employee association in the plant. All those present voted unanimously in favour of such an association.

20. The following morning Ms. Park announced in the lunchroom that the people who did not come to the meeting should be informed as to what had occurred there. An argument then ensued between Ms. Park and Mr. Hussey. Later that day, Mr. Hussey asked Mr. Garner why he had allowed Mr. Hunt to hold an association meeting in the lunchroom. Mr. Garner replied that the employees involved had come to him and asked for the use of the lunchroom. He told Mr. Hussey that he had told Mr. Hunt that employees could have an association meeting in the lunchroom as long as they didn't talk about the union. Mr. Hussey told Mr. Garner that he "couldn't do that" and Mr. Garner replied that he was entitled to supply the facilities. An application for certification was filed by the applicant that same day.

21. On October 10th, the parties attended at the Labour Board for the first scheduled day of hearing, although the hearing did not commence that day. On October 22nd, the employer recalled Betty Hussey, Charlotte Hussey and Mary Wright to employment.

22. This is the sequence of events which led to the matters before us. The applicant alleges that these facts disclose numerous unfair labour practices including the layoffs, statements made by the lead hands, Mr. Osmond, and Mr. Garner and the involvement of the respondent in the creation and encouragement of opposition to the union and the employee association.

23. Because a number of lead hands were so heavily involved in these events, we find it useful to address the question of the status of these individuals first. Obviously if they are members of management, their statements and actions take on a different character than if they are members of the bargaining unit.

24. The evidence indicates that there are a total of five lead hands in the plant. Bonnie Gmelin, Randy Hunt, Vaughn Hussey, Michelle Penney and Jim Simas supervise the assembly and baking area, the pastry and pasta area, the preparation area, the packaging area, and the shipping and receiving area, respectively. The first four of these were challenged by the applicant as excluded from the bargaining unit by the operation of section 1(3)(b) of the *Labour Relations Act* on the basis that they exercise managerial functions.

25. The Board heard evidence with respect to the duties and responsibilities of these individuals from a number of witnesses, including direct testimony from Ms. Gmelin, Mr. Hunt and Mr. Hussey. Not surprisingly, there were some inconsistencies in the evidence, and as a result, our conclusions are based on a composite picture of their duties and responsibilities. In arriving at that composite picture, we were not aware of the fact that some of the evidence was coloured by the various views of the individuals involved.

26. The evidence indicates that the primary function of the lead hands is to ensure the smooth operation of their respective areas. They are provided with weekly production schedules which they use to direct and monitor the flow of production. There is some paper work associated with the position, but the majority of their time is spent on direct production work, including food assembly, food preparation, packaging and so forth, depending on the area involved.

27. Work is allocated to employees by the lead hands and they have the authority to move employees between areas when necessary as a result of fluctuations in work. In some departments they are also responsible for ensuring that there is an adequate supply of materials to assembly lines. When changes occur in the production schedule, the lead hands are advised accordingly by the plant manager, and they make any adjustments necessary in the designation of work or the direction of production.

28. Lead hands are paid an hourly rate which varies from \$7.25 per hour for the two women to a range of between \$9.00 and \$13.00 for the three men. This is in contrast to an hourly rate for other employees which ranges between \$5.50 and \$6.25 an hour.

29. There is no independent authority vested in lead hands to hire and fire employees, a function which is usually performed by the plant manager. Although some have made a number of recommendations with respect to hiring, those recommendations were made under such anomalous circumstances that we cannot conclude from the evidence before us that they have the power of making effective recommendations in the sense that this phrase is used in the Board's jurisprudence. Neither do they discipline employees, although they may correct their work informally on occasion. They have some responsibility for training new employees, but this is, in part, a function of their experience and expertise and is shared by other senior employees.

30. There is no evidence that lead hands are involved in promotions, and the evidence with respect to their role in wage increases is conflicting. Similarly, there is no evidence that they perform routine evaluations, although it appears that they were asked to rank employees prior to the layoffs described above, and that these rankings were given effect in the layoffs that followed.

31. Time sheets for employees are kept and verified by lead hands who also have some limited authority to grant time off and assign overtime. They do not have desks, wear the same uniforms as other employees, and are subject to the same general working conditions as other employees, although it appears that the male lead hands may have access to benefit plans not generally available to others. The lead hands attend meetings once a week with the plant manager and Mr. Garner in which a number of subjects are discussed, focusing mainly on production matters.

32. Section 1(3)(b) operates to exclude persons who exercise managerial functions or who are employed in a confidential capacity in matters relating to labour relations from the collective bargaining process. To be excluded on the basis of exercising managerial functions, the Board has established that an employee must be both primarily employed in the direction and supervision of employees and possess effective control or authority over those employees (*McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. April 261). The onus of demonstrating that an individual should be excluded from collective bargaining falls on the party seeking the exclusion, as the Board pointed out in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121. In that case the Board also commented on the changing role of the traditional foremen:

(4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining.

33. The Board has also recognized that an individual may perform a variety of functions and has adopted an approach which stresses weighing the totality of the available evidence. As the Board set out in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the management line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety.

34. Taken as a whole, the evidence does not persuade us either that the lead hands are primarily employed in the direction and control of employees or that they possess effective control over them. The degree of independent discretion that they exercise is minimal, and the nature of the decisions they do make on their own is relatively minor. The only point which we find troubling in arriving at this conclusion involves the evidence of the role played by the lead hands in the layoffs described above. However, for reasons which will become obvious, we are satisfied that their involvement in that particular event was unusual and related to the desire of the respondent to set a stage for the subsequent layoffs, rather than reflecting the normal range of duties and responsibilities assigned to those individuals. We conclude that the applicant has not established that the lead hands fall within the ambit of section 1(3)(b) so as to exclude them from the bargaining unit.

35. This does not mean that the activities of the lead hands are of no significance in this matter. The applicant has alleged, among other things, that the respondent has violated section 64,

and section 66 of the Act as a result of the events described. Both those sections proscribe certain activities on the part of either an “employer, employers’ organization, or person acting on behalf of an employer or an employers’ organization” (sections 64 and 66). We must therefore determine as a matter of fact whether the activities engaged in by the lead hands were conducted either on their own initiative or on behalf of the employer in this matter. The extent of these activities makes it useful to address this issue in the context of our analysis of each set of events, rather than at this point.

36. Turning first to the matters raised in the applicant’s section 89 complaint, and in that regard, to the letter sent by the respondent to employees, counsel for the applicant highlighted the following paragraphs as the subject of his concern:

The law allows the Union to promise you many things. You should recognize however, that the Union can’t guarantee you that they will be able to deliver any of their promises. (You have only to look at the Burn’s and Eaton’s situation or any of the companies that have had layoffs, to see how little a union can guarantee!) They cannot guarantee you increased pay or better fringe benefits, working conditions, through negotiations with the company. Please remember that both parties must agree – if not there is usually a strike – where no one wins. Do you really feel you need to pay a third party to negotiate for you? Your company has tried to be fair in the past and has shown a willingness to listen.

* * *

- Those of you who have been with us for a while know that we try to provide regular hours for you -- even when we are not busy -- to provide a sense of security.

* * *

Over the past 15 months, we have worked together to build a first class specialty food manufacturing operation. We have done this by establishing a very positive “family type” atmosphere. This atmosphere has been noted by our new customers – who selected us to make their product because of their confidence in our ability, our people and continuity of supply. Should you decide for a union, much of this could be lost – seriously jeopardizing our existing and future business.

37. Mr. Garner told the Board that the letter was drafted from a model provided by his counsel’s firm and that his motivation in sending out the letter was two-fold: he was disturbed an employee’s apprehensions with respect to her job security, and he wished to make the company’s position on the union campaign known to employees. He testified that the third paragraph set out above referred to the following: that the company was supportive of families; that customers, and in particular, the Catelli and Old El Paso companies who had provided the respondent with two major contracts, had noted that employees seemed to be enjoying what they were doing and enthusiastic about their work; that it was a selling feature generally, and in particular with respect to these two contracts, that there was no possibility of disruption in the supply of products to customers as a result of union activity; that if employees decided for a union, business generally (and once again in particular the Catelli and Old El Paso business), might be lost as a result of serious doubts about the continuity of supplies; and that it was necessary to demonstrate to customers in this industry that an employer had the confidence of his staff. It was clear from Mr. Garner’s testimony that, in his view, the respondent’s ability to provide a supply of products to customers which was uninterrupted by union activities was a primary factor in his company’s success.

38. With respect to the second paragraph excerpted above, Mr. Garner told the Board that it referred to the fact that the company made it a priority to provide regular, predictable wages and work. He testified that during the previous spring there had been a dramatic downturn in business, but despite considerable financial cost to the company no one had been laid off. Rather, the work-

ing hours of all employees were reduced to try and maintain a reasonable take-home pay for the entire group. Mr. Garner advised the Board that no permanent employees had ever been laid off before and that there was a previously understood commitment to employees not to lay off, a commitment which he agreed had been communicated to employees before these events.

39. While section 64 expressly reserves the freedom of an employer to express his views, the Board discussed the limitations on that freedom in *Seven-Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87:

In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the restraint on an employer's freedom of expression was explained in this way:

The Act recognizes that an employer is in the more immediate position to affect an individual's employment relationship, if only by virtue of its freedom to advance, preserve, impede or terminate an individual's employment. Therefore, by the term of the Act, that very freedom is restricted. In order to protect and promote the collective bargaining process the Legislature has provided that no employer is free to affect a person's job security or conditions of employment when the employer's action is prompted by anti-union motive, (e.g. section 58 [now section 66] of the Act). For the same reason, by virtue of the Act, an employer's freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his views of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union sentiment which go to the sensitive area of changes in conditions of employment or job security.

26. A mere expression by the employer of its preference to remain non-union will not violate section 64, as the Board noted in *Playtex Ltd.*, [1972] OLRB Rep. Dec. 1027 (at 5):

* * *

Any suggestion that unionization will be accompanied by loss of jobs will, however, violate that section: *Dylex Limited*, [1977] OLRB Rep. June 357, *Viceroy Construction Company*, *supra*; *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1489.

27. Where the employer's message is that future enjoyment of current or previously promised wages, working conditions or benefits is conditional on the outcome of a representation vote, this also constitutes undue influence: *Gestetner (Canada) Limited*, [1971] OLRB Rep. Feb. 62; *J.E. Martel & Sons Limited*, [1972] OLRB Rep. Aug. 811; *Hostess Food Products Limited*, [1975] OLRB Rep. March 218.

40. In this case, the letter highlights the existence of a previous commitment to employees in the sensitive area of job security, and skillfully implies both that that commitment might no longer hold if employees chose to be represented by a union and that the effect of unionization might result in diminished job security as a result of a loss of business. In other words, unionization is linked both to a possible loss of jobs and to a withdrawal of the job protection the employer previously extended to employees.

41. Mr. Garner told the Board that the passage "should you decide for a union, much of this could be lost - seriously jeopardizing our existing and future business" was a statement of fact, and not a threat. This may not be a particularly useful distinction. The Board noted in *Seven-Up/Pure Spring Ottawa*, *supra*:

....In assessing employer conduct the Board is obliged to take into account the responsive nature of the relationship of employees with their employer. Predictions of what the future holds may constitute threats or promises, if it is in the power of the employer to make the pre-

dictions come true and the employees perceive in their employer a willingness to exercise that power in response to the success or failure of their attempt to unionization.

Moreover, aside from Mr. Garner's own assertions on this point which we found unconvincing, there was no evidence that the economic consequences he predicted were likely to occur. Indeed, had there been such evidence, we would have had some difficulty in coming to the conclusion that a company which made its non-union status a key selling point to its corporate customers could use such a course of conduct to defend statements that might otherwise constitute undue influence, given the scheme of the *Labour Relations Act*. We conclude that the employer's letter crossed the boundaries of freedom of speech in the context of the *Labour Relations Act* and represented an attempt to use undue influence to discourage employees from supporting a union contrary to sections 64, 66 and 70.

42. At this time we find it useful to turn to the statements made by Ms. Gmelin prior to the union meeting on September 3rd to determine whether she was acting on behalf of the employer or on her own initiative in the course of these activities. Mr. Garner and Ms. Gmelin both denied that he had instructed her to make the statements in question although Ms. Gmelin's denial was significantly qualified. However, we note that according to Ms. Gmelin, she commenced her statements both in the washroom and in the lunchroom by saying, "I want to pass on a message". We also note that the message she passed on was essentially the same as the one Mr. Garner told the Board he was attempting to convey to employees by means of his letter. The message passed on by Ms. Gmelin also accurately reflected the concerns which Mr. Garner expressed to the Board in his testimony. Having had the opportunity to assess the credibility of both Mr. Garner and Ms. Gmelin and to observe the nuances in their demeanour and testimony, we are convinced that Mr. Garner played a role in the initiation of this message. Indeed, we find it simply implausible that Ms. Gmelin in particular would have framed her statements as she did or that she would have managed to state exactly what Mr. Garner wished to convey to employees without Mr. Garner's prompting or involvement. We conclude that in making the statements to employees in the washroom and in the lunchroom on September 3rd, Ms. Gmelin was acting on behalf of the respondent within the meaning of section 64 and section 66 of the Act.

43. We also find such statements to be violations of sections 64 and 66(c). There was a conflict in the evidence as to whether Ms. Gmelin had referred only to the loss of the two contracts or to the loss of jobs. Even accepting Ms. Gmelin's version of those statements as we have done in setting out the facts described above, we find that her statement was designed to communicate to employees that unionization might well threaten their job security. In the context of this workplace, and given the size of the two contracts, the message that jobs would be lost if the two contracts were cancelled was clear, whether or not it was explicitly stated or merely implied.

44. Turning next to the matter of the layoffs, the evidence indicates that all five employees who were laid off were hired along with others, between July 2nd and August 12th of 1986, in anticipation of an expansion of business. Mr. Garner testified that production for the Catelli contract, under which the company was to supply to Catelli a line of frozen Italian entrees, was scheduled to commence on August 29th. However, a delay in securing the approval for packaging required from Agriculture Canada resulted in a period during which the company was oversupplied with labour in relation to the demand for its products, and, as a result, losing money. In addition, there were some delays in receiving new equipment, although this does not appear to have been a significant factor as Mr. Garner agreed that production would have proceeded regardless of the equipment delays had they received the packaging approval. There was also some suggestion of a general downturn in business, although this was not pursued to any great extent by the respondent. Packaging approval was granted on September 17th although the employer did not receive

the approval papers until September 24th. The finished packaging was received in the plant on October 15th.

45. Mr. Garner testified that the decision to lay off employees had been formulated over a period of several weeks prior to the layoff. Lead hands were asked to rank employees in their areas, and the layoffs were conducted on the basis of this ranking. There was some conflict in the evidence about the criteria they employed for the ranking, with Mr. Garner stipulating that it was done on the basis of seniority, Mr. Osmond citing efficiency as the basis and Ms. Gmelin describing the criteria as proficiency and good work habits. Mr. Osmond told the Board that there was no discussion of a reduction of hours or any alternate scheme to avoid a layoff.

46. The respondent's version of the events which led to the layoffs is subject to a number of inconsistencies. Mr. Garner testified that he had originally anticipated that he would receive approval for the Catelli line packaging by early or mid-August. This is inconsistent with the fact that he did not sign the request for approval which initiates the approval process until August 25th. Indeed, if the decision to lay off took place over a period several weeks before the layoffs on September 17th, those discussions must have taken place very shortly after the request for approval was sent in, that is, before the delay occurred which is cited as the reason for the layoffs.

47. Both Betty Hussey and Charlotte Hussey testified that there was no shortage of work prior to the date of the layoffs. All employees had received new uniforms with their names on them on September 10th. Both Robert May, who worked in the shipping and receiving area on a full-time basis, and Jeffery Hermer, who worked there only occasionally, gave evidence of occasions subsequent to the layoffs on which there were insufficient quantities of products to meet the orders received. While Mr. May testified that this occurred from time to time in the normal course of events, the problem had worsened after the layoffs.

48. Mr. Hermer also told the Board that a conversation occurred after the layoffs in which Ms. Gmelin complained about the difficulty of meeting production requirements with so few staff. Although Ms. Gmelin denied that she had made such a complaint, she was willing to concede that there were times after the layoff when production had been "over-booked". She also testified that the company could "never make enough" of some products, including scotch pies and quiches, because they were simply stockpiled in the customer's warehouse. In this regard, she advised that an excess of 500 to 700 cases of these products would not be a problem.

49. We are not unaware of the fact that there are limitations to the evidence given by some of these witnesses due to the fact that the range of their information was restricted. Nevertheless, the evidence as a whole on this issue raises some serious doubts about whether the respondent was in fact oversupplied with labour at the time of the layoffs.

50. Even assuming, without so finding, that there was an oversupply of labour at the critical time, there are still a number of other unanswered questions raised by the facts of this case. It was not disputed that this was the first time the company had laid off permanent employees. Although the company had only been in business for approximately a year, we find Mr. Garner's commitment to employees to avoid layoffs to be significant, coupled with the fact that the respondent did not consider the alternative of reducing the hours of employees as it had in the past. We cannot avoid the conclusion that this sudden change in approach, coming as it did on the heels of Mr. Garner's letter raising concerns about job security and layoffs, was at least partly motivated by a desire to provide employees with a graphic illustration of the points made in his letter.

51. We also remain unconvinced by the respondent's explanation of how employees were selected for the layoffs. As noted previously, there was a conflict in the evidence given by the res-

pondent's witnesses as to the criteria used for selection. In fact, the evidence demonstrates that the specific mix of employees actually laid off would not be produced by the consistent application of any of the criteria cited.

52. Moreover, the explanations given for deviating from these criteria in the case of some employees were not borne out by the evidence. For example, both Mr. Garner and Ms. Gmelin referred to the heavy lifting aspect of employee Tom Heagy's job, among other things, in explaining why he was retained in preference to Charlotte Hussey who had greater seniority. However, the evidence established that Mr. Heagy was approximately 5' 2" tall, weighed approximately 125-130 pounds and that he obtained the assistance of other employees when heavy lifting was required. As it turned out, those laid off were either union supporters or employees who had declined to sign the petition in support of the employee association. It was common ground that it was not difficult to identify certain employees who supported or opposed the union at this point in the campaign, although the respondent denied that this was a factor in the selection process.

53. Having reviewed the evidence as a whole, we conclude that the layoffs were at least partly motivated by anti-union animus, and were in violation of sections 64 and 66 of the *Labour Relations Act*.

54. Turning next to the statements made by Denise Penney, we find them to be very different in nature from those made by Ms. Gmelin. The tone and character of the statements, together with the context in which they were made, lead us to the conclusion that Ms. Penney was expressing her individual apprehensions and frustrations rather than delivering the views of Mr. Garner. Ms. Penney may well have believed that the company would close down if the union came in and may well have wished to "bash Charlotte's face in"; however, there was no evidence from which we could reasonably conclude that in expressing those beliefs she was acting on behalf of the respondent.

55. The involvement of the respondent in the formation of the employee association is another matter entirely. The evidence makes it abundantly clear that Mr. Osmond himself was deeply involved in the establishment of the association. Under cross-examination, Mr. Osmond, Mr. Hunt and Ms. Park agreed that Mr. Hunt and Ms. Park had had a number of conversations with Mr. Osmond about the petition supporting the employee association during the time it was circulating in the plant. Mr. Osmond testified that Ms. Park had asked him to help them, and that he was trying to help in any way that he could. It is clear from the conversation between Mr. Osmond and Charlotte Hussey that this assistance included making himself available to individual employees who wished information about the association, setting out how the association would function and expounding upon some of its merits. Mr. Hunt also agreed that both before and during the circulation of the petition, he would go to Mr. Osmond for answers to questions and advice with respect to the petition and the employee association.

56. Ms. Park testified that she decided upon the idea of both the employee association and the petition as a means of recruiting support for the association by herself, after soliciting information from friends and acquaintances outside the plant. While that may well have been the case, we find that shortly after Ms. Park brought the petition into the plant, the idea of the employee association and the petition were adopted by Mr. Hunt and Mr. Osmond who from then onwards were for all intents and purposes guiding the progress of the petition. In this regard, it was apparent that Mr. Hunt and Mr. Osmond were essentially allies in these activities. It was undisputed that Mr. Osmond, the plant manager, is a member of management and thus his actions are those of the respondent's; we also find that Mr. Hunt was acting on behalf of the employer in circulating the peti-

tion and promoting the association given the evidence that he was working so closely with Mr. Osmond in this enterprise.

57. It was also clear that Mr. Garner was involved in facilitating the establishment of the employee association. The evidence demonstrates that Mr. Garner would have been aware that Mr. Hunt was opposed to the union when he approached Mr. Garner with his request for the use of the lunchroom. We reject Mr. Garner's contention that he was providing a forum for employees to vent their feelings and settle their differences. Rather, we find on the evidence before us that he was using the resources of the plant to assist in the establishment of the employee association.

58. Mr. Garner did allow the lunchroom to be used for an earlier employee meeting requested by Mr. Hussey. However, the intent, character and timing of that meeting were quite different from the second meeting. The first meeting was requested earlier in the campaign and was attended by employees with a variety of views on unionization. Although it is not clear what Mr. Garner expected or intended to happen at the first meeting, he was obviously taken aback by what did happen, that is, he was met with a number of hostile questions put to him by Mr. Hussey. It appears that the debate after Mr. Garner left was lively and that both pro-union and anti-union points of view were strongly represented.

59. This is in contrast to the second meeting requested by Mr. Hunt which seems to have been something of a formality. Although a notice was posted in the lunchroom advising employees of the meeting, Darlene Laird, a witness called by the objectors, testified that the employees knew in advance by word of mouth that the purpose of the meeting was to go and sign for the association. The testimony with respect to the events of that second meeting indicates that there was no divergence of opinion and that it was essentially a meeting of employees opposed to the union.

60. We are satisfied by the evidence, including Mr. Garner's statements to Mr. Hussey and his bitterness with respect to the events of the first meeting, that he would not have allowed the lunchroom to be used for such a meeting of employees with genuinely divergent viewpoints again. Indeed, we conclude that he allowed the use of the lunchroom for the second meeting because he was aware that the meeting was being requested by anti-union employees.

61. Was the involvement of Mr. Osmond, Mr. Garner and Mr. Hunt on their behalf in the employee association such as to constitute a violation of the *Labour Relations Act*? In the circumstances of this case, we conclude that it was. It was clear that their conduct in encouraging and facilitating the establishment of the association was designed to diminish the appeal of a union in the eyes of employees by providing an employer-approved alternative. As Mr. Osmond described it to Charlotte Hussey, the employee association purported to offer some of the same benefits of employee representation without the disadvantage of union dues.

62. The likely impact of such an alternative would be to siphon off support from the union campaign. In this case, the extensive degree of the employer's involvement in the employee association might alone constitute a breach of the Act. As the Board noted in *Upper Canada Furniture Ltd.*, [1981] OLRB Rep. July 1016, such support may qualify as a violation in view of the sensitive economic relationship between employee and employer:

Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of section 56 [now section 64] of the Act. Given their economic dependence on their employer, employees may be readily swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.

63. In this case, however the impact of the respondent's sponsorship was heightened by its

other activities, including Ms. Gmelin's warnings, Mr. Garner's letter and the layoffs. Not only did the employee association apparently have the employer's seal of approval, but it was juxtaposed against the union which had been identified to employees as hazardous to their job security. We conclude that the respondent violated sections 64 and 66 of the Act by its activities in this regard.

64. To summarize at this point, we have found that the lead hands are not excluded from the bargaining unit by virtue of section 1(3)(b), and that the employer violated the *Labour Relations Act* by reason of Ms. Gmelin's statements, Mr. Garner's letter, the layoffs and the involvement of Mr. Garner, Mr. Osmond and Mr. Hunt in the employee association. As a result of these findings, and those set out below, it is not necessary for us to comment on the other matters alleged by the applicant to be violations of the *Labour Relations Act*.

65. Before the Board will exercise its discretion to certify a union under section 8, three conditions must be met. It must be established that there has been:

- (1) an employer contravention of the Act, so that,
- (2) the true wishes of the employees are not likely to be ascertained; and
- (3) that the union has membership support adequate for collective bargaining.

66. Each of the violations of the Act described above alone would meet the first condition of section 8, and thus we have no difficulty in concluding that this element of section 8 has been established.

67. The Board must now consider whether the second element of section 8 has been satisfied. We note that the effect of the respondent's activities would be to dilute the interest of employees in unionization and collective bargaining to a significant degree. The warnings contained in Ms. Gmelin's statements and Mr. Garner's letter go directly to the core of the economic dependency which is the basis for an employee's vulnerability in the work place and would be likely to convince employees that unionization was a perilous venture. This impression would be reinforced by the layoffs which provided a vivid demonstration of the risks alluded to by Ms. Gmelin and Mr. Garner.

68. At the same time, the respondent's involvement in the employee association would be likely to further weaken the attraction of collective bargaining by the establishment of a safe alternative. Taken together, the employer's activities would have a seriously distorting effect upon employee opinion. We are satisfied that as a result of the respondent's unlawful conduct, the current true wishes of employees are not likely to be ascertained. Indeed, even the activities of Mr. Garner and Mr. Osmond alone would support this conclusion. Moreover, this is not a case where the damage to the ability of employees to express their true wishes can be repaired by the range of remedies available under section 89.

69. The objectors called a number of witnesses to testify that their views had not been swayed by the respondent's conduct. We did not find this evidence of much assistance. The Board has commented before that the test employed with respect to this element of section 8 is an objective, rather than a subjective one (*Zest Furniture Industries*, [1987] OLRB Rep. Feb. 299):

37. In examining whether the employer's contraventions have resulted in a situation where the true wishes of employees are not likely to be ascertained, the Board applies an objective rather than a subjective test. The Board described it in this way in *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250:

In other words, it must be demonstrated by *some objective measure* that the contravention of the Act, whether by any overt act or subtle subterfuge is so perverse that the likelihood of a meaningful expression of employee views is lost.

[emphasis added]

38. In some cases, the Board has referred to the impact of employer misconduct on an “employee of average intelligence and fortitude” (*Wolverine Tube, Division of Calumet and Hecla of Canada Limited*, 63 CLLC ¶16,296) while in others the bench mark has been expressed in terms of the “typical employee” (*Seven-UP/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87). The Board will examine both the nature of the employer’s misconduct and the circumstances in which it took place, and its conclusions will vary depending on the specific mix of factors that it finds in any particular situation.

39. Where the impact of misconduct is obvious, it may be that no demonstrative evidence will be required. As the Board noted in *Robin Hood Multifoods*, *supra*:

There may be occasions, however, where the contravention would so obviously undermine the likelihood of a free vote (such as a direct or implicit threat to employees’ job security) that no demonstrative evidence need be adduced with respect to [whether the conduct was such that the true wishes of the employees were not likely to be ascertained].

40. In other cases, it may be useful for the parties to adduce facts which might enlighten the Board as to the effect of less obvious misconduct in the circumstances of a specific work place, including objective facts which may show that the impact of certain activities is enhanced or diminished in the particular circumstances. But in all cases the test the Board uses will not be how or whether employee “A” or employee “B” was personally affected, but rather the likely impact of the misconduct on the typical employee. Consequently, it is neither necessary nor desirable for the parties to parade a series of employees before the Board to testify as to their individual responses or feelings as a result of the employer’s activities.

41. Not only is such a procedure time-consuming and expensive, but the evidence proffered is often unreliable. (See *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848). The Board commented on this problem in *Wolverine Tube*, *supra*:

Our colleague, in his dissent, apparently takes the position that as there is no direct testimony from the employees themselves that they were in fact influenced by the conduct of the employer, there is, therefore, no evidence before us on which we can properly find that [a previous vote] did not disclose the true wishes of the employees. It is, of course, a trite principle in the law of evidence that no party is bound to prove all of its case by direct evidence. Reasonable and necessary inferences may and must be drawn from all the evidence adduced and that which is clearly inferable from the evidence it is much proved as if it had been established by direct evidence. *Indeed, in reaching a decision as to whether or not employees have or have not been influenced by improper conduct on the part of a union or employer, the Board has often been constrained to view the objective facts and overt acts of the parties with the reasonable inferences to be gathered from them, as more persuasive evidence of the true facts than the subjective assertions and counter assertions of employees, given in the presence of the union or employer, that they were or were not influenced or in what way, by the conduct in question.*

[emphasis added]

42. Where such evidence supports the employer’s point of view, the peculiar vulnerability of employees can result in a desire on their part to publicly associate themselves with their employer. As the Board commented in *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140:

Firstly, the Board’s procedures do not favour the taking of viva voce evidence from employees in the presence of their employer at a Board hearing as the optimal means of determining their wishes respecting union representation. The Board’s jurispru-

dence has long recognized the natural affinity of an employee to identify, publicly, at least, with the interest of his employer.

43. Indeed, where an employer has engaged in unfair labour practices, it may be difficult to know whether such testimony has itself been influenced by those activities. (See: *Lorain Products (Canada) Limited*, [1977] OLRB Rep. Nov. 734.)

44. Even where the evidence is brought out through union witnesses, it may be of little value when the Board has no way of knowing whether a witness is representative of other employees. The fact that the views of a union stalwart remain unchanged does not tell the Board very much about the views of those who are less committed. The Board's task is to assess the impact of particular misconduct on the ability of a typical employee to express his or her wishes, that is, one who is neither unusually intrepid nor unusually timid.

70. In any event, we found the evidence of little practical value. It was clear that most of these witnesses consider themselves to be opposed to the union and remained opposed despite the respondent's conduct. Since the respondent's activities were designed to create opposition to the union, we find this evidence to be unreliable as a barometer of the impact of those activities on the broader group of employees, including those who may have been union supporters and those who may have been undecided in their views.

71. A great deal of evidence was adduced by the respondent with respect to the atmosphere in the plant and how it had deteriorated after the commencement of the union campaign. In our view, such deterioration was largely the responsibility of the respondent. To a significant degree it stemmed from the fears raised by Mr. Garner and Ms. Gmelin and the creation of an artificially inflated opposition to the union. If anything, such an atmosphere supports our findings; certainly we do not find it negates our conclusion.

72. Lastly, the parties stipulated as an agreed fact that the applicant had membership support adequate for collective bargaining. On the basis of this fact, we are of the opinion that the third condition of section 8 has been met.

73. We therefore determine that pursuant to section 8, the applicant will be certified as the bargaining agent for the employees in the bargaining unit set out earlier. A certificate will issue in these terms.

74. Furthermore, since we have found that the respondent violated section 89 of the Act, we direct that the respondent:

- a) forthwith reinstate Randy Hall and Ed Howell to employment to the positions that they held immediately prior to their layoffs;
- b) pay to Charlotte Hussey, Betty Hussey, Mary Wright, Ed Howell and Randy Hall compensation for any loss of wages and benefits as a result of their layoffs, plus interest thereon calculated in the manner described in Practice Note No. 13, dated September 1980;
- c) cause copies of the attached notice marked "Appendix" as supplied by the Board to be signed by Malcolm Garner and posted in conspicuous places on its premises and keep such notices posted for sixty working days and take all reasonable steps to ensure that the notices are not altered or defaced or covered by any other material; and
- d) provide reasonable access to a representative of the applicant from

time to time during the aforesaid 60-day period to permit the applicant to satisfy itself that the respondent has complied with the posting order in paragraph c.

75. The Board remains seized to resolve any dispute with respect to implementating this decision.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I disagree with my colleagues.
 2. This is not a case where invoking section 8 of the *Labour Relations Act* will solve any of the problems that the applicant union faced during its organizing campaign. Those problems will remain unless and until a vote takes place to determine the true wishes of the employees.
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Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAYOFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

CAMBRIDGE CANADIAN FOODS INC.

PER: _____
(MALCOLM GARNER)

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

2952-86-R United Food and Commercial Workers International Union, Applicant v. Canada Dry Bottling Company Ltd., Respondent v. Group of Employees, Objectors

Certification - Petition - Gap in evidence with respect to physical custody of petition - Failure to adduce direct evidence as to what happened to the petition constituting a material gap in the evidence required to discharge the onus of proving the voluntariness of the petition - Petition given no weight - Certificate issuing

BEFORE: *V. Solomatenko*, Vice-Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

APPEARANCES: *E. G. Posen* and *Dan Lacroix* for the applicant; *Walter Thornton* and *Jim Loughridge* for the respondent; *Paul Payne* and *Mervin Lloyd* for the group of employees.

DECISION OF THE BOARD; March 27, 1987

1. The name of the respondent is amended to read: "Canada Dry Bottling Company Ltd.".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at the City of Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, persons employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The applicant has filed membership evidence demonstrating that it has a level of support amongst the bargaining unit employees in excess of that required under the Act for certification without having a representation vote taken. However, there was also filed with the Board, a handwritten document, dated February 2, 1987, purporting to be a statement of desire to oppose the union's application (hereinafter referred to as the "petition"). The petition contains eight signatures and the Board is satisfied that there is sufficient overlap of signatures of employees who had signed both the petition and union membership cards as would cause the Board to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote, if satisfied that the petition is voluntary. The Board therefore heard the parties' evidence and representations with respect to the voluntariness of the petition.
6. In support of the petition, the Board heard the evidence of Paul Payne who is employed by the respondent as a sales representative and Mervin Lloyd who is employed as a driver merchandiser. It is Mr. Payne's evidence that he drafted the petition at his home on the evening of February 2nd, at which time he signed his name as the first name on the petition. Five of the remaining seven signatures were obtained late in the afternoon on Wednesday, February 4th in circumstances which will be noted in some detail shortly. The remaining two signatures were obtained on the morning of February 5th at a restaurant in the Peterborough area, after which Mr. Payne personally delivered the petition to the Board. As to the five signatures obtained on February 4th, Mr. Payne was able to testify as having personally witnessed three of those signatures. Mr. Lloyd's

evidence is that he “witnessed” the other two signatures, but he was not the person who presented the petition to them.

7. The applicant’s organizational drive took place during the month of January. It is readily conceded by both witnesses that during this time the employees had some significant concerns with their employment situation. According to Mr. Lloyd, the situation had been “downhill” for approximately 18 months. There appear to have been two major areas of concern for the employees. The first involved questions regarding the continuation of the Peterborough operation in view of the corporate merger or take over of Canada Dry by Coca-Cola. Secondly, there were problems with the former manager of the Peterborough location, Rod Cooper. Mr. Lloyd attended a social function in Toronto for the company’s employees on January 24th. At that time, he had a conversation with Mr. Reeve, the company’s personnel liaison manager at the Toronto office. Mr. Lloyd’s evidence is that during that conversation he expressed the employees’ various concerns with their employment situation in Peterborough. However, he states that he did not discuss the on-going union organizing campaign with Mr. Reeve during that conversation.

8. The union filed its application for certification on January 28th. On the evening of January 29th there was a meeting at a local hotel involving all the employees. The company was represented by Mr. Reeve and Mr. Loughridge who is the company’s Ontario sales manager at the Toronto office. The evidence is not clear as to when the meeting was called, but Mr. Lloyd believes that Mr. Reeve called him personally to advise him of that meeting. In Mr. Lloyd’s words, the meeting was essentially a “gripe session”. He states there were no promises made by the company, but there was agreement that it had neglected the Peterborough operation. It is not clear from the evidence when the fact was announced to the employees, but Mr. Cooper’s employment was terminated effective January 30th and he was not in attendance at the meeting on the evening of January 29th.

9. On February 3rd, the employees were advised that there would be a meeting the next morning at 7:00 a.m. which is their normal starting time. The evidence is that the employees were expected to be in attendance. Both Mr. Loughridge and Mr. Reeve were present at this meeting as well. The meeting lasted 15 to 20 minutes and took place in what is referred to as the drivers’ common area at the front of the plant. A copy of the Notice to Employees of Application for Certification (green sheet) was at that time already posted on a bulletin board in the drivers’ common area. Both Mr. Payne and Mr. Lloyd testified that the application for certification was not a direct topic of discussion that morning. According to both, the main purpose of the meeting was to discuss the question of a new manager for the Peterborough operation. Mr. Payne’s evidence is that the matter of the application for certification only arose in response to an employee’s question of who the new manager was going to be. He states that the company’s reply to the question was that it could not say anything further on the subject because of the application for certification. Both witnesses agree that the question of the possibility of the respondent closing the Peterborough operation was on their own minds and probably on the minds of the other employees. In response to counsel’s question, Mr. Lloyd’s evidence is that no one stated at the meeting that the operation would be closed down if unionization took place. He also states that Mr. Loughridge assured them that to the best of his knowledge, the Peterborough operation would be continuing. Mr. Lloyd concedes that the meeting on the morning of February 4th influenced his decision to sign the petition.

10. As previously noted, Mr. Payne had drafted the petition on the Monday evening, February 2nd. At the time of the meeting on the morning of February 4th, his was still the only signature on the petition. After the meeting, he gave the petition to one of the other signatories who, for purposes of these proceedings, is identified by the Board as “P5”. Mr. Payne returned to the

plant later that same day at about 4:00 p.m. At that time, "P5" returned the petition to him and at this point Mr. Payne's signature was still the only one on the petition. There was no evidence from "P5", nor anyone else, as to the whereabouts of the petition from about 7:00 a.m. until 4:00 p.m. when it was returned to Mr. Payne. The five signatures obtained on the petition on February 4th were all obtained during the period of approximately one hour after Mr. Payne received the petition again from "P5". These signatures were obtained in the same common area or room in which the meeting had taken place earlier that morning. The evidence is that no member of management was present in the common area during the time that the petition was being signed and circulated. Management's offices are located off this common area and Mr. Payne states that Mr. Reeve may have been in the warehouse during this time. In terms of the actual process of obtaining the five signatures on the petition that afternoon, Mr. Lloyd's evidence is that Mr. Payne merely explained that this was a petition to oppose the union's application for certification. It is also his evidence that during this period of about one hour the employees' discussion was only to the effect that they needed more time to think about the whole question of unionization.

11. The Board conducts its inquiry into the circumstances surrounding a petition in order to determine on the evidence before it whether an employee's signature on that petition may be construed as a voluntary expression of that employee's desire to oppose the union. Where the Board concludes that the signatures constitute a voluntary expression of opposition to the union, it thus finds the petition to be "voluntary". If the petition is voluntary and contains sufficient signatures as would bring the level of unequivocal membership support below that required for automatic certification, the Board will normally exercise its discretion to order a representation vote to determine the true wishes of the employees.

12. The onus of proving the voluntariness of the petition rests with the employees who ask the Board to give it effect. As the "green sheet" indicates, the Board requires direct evidence with respect to the circumstances surrounding the origination of the petition and the manner in which each of the signatures was obtained. Before the Board can conclude that a petition is voluntary, it must be satisfied that there has been no involvement by management or even perception of management involvement in any aspect of the petition. Where the evidence fails to satisfy the Board that the petition originated and was circulated in circumstances which were free of either direct or perceived management influence or interference, it will not accept the petition as a voluntary expression of opposition to the union. In conducting such an inquiry, the Board has consistently held that the question of the physical custody of the petition throughout its entire period of existence is a key factor in determining whether it has been free of management influence or interference. Where there is a hiatus in the evidence with respect to the custody of the petition, the Board cannot be so satisfied and therefore does not give weight to the petition: see, for example, *Vered & Harvey Company Limited*, [1971] OLRB Rep. Nov. 736 and *Groves Park Lodge*, [1979] OLRB Rep. Sept. 871.

13. As previously noted, in the instant case there is a gap in the evidence with respect to the custody of the petition from approximately 7:00 a.m. to 4:00 p.m. on February 4th. On the basis of the lack of that evidence alone, the Board cannot be satisfied as to the voluntariness of this petition. The gap in the evidence with respect to the custody of the petition occurs at a very critical juncture. Mr. Payne surrendered its custody to "P5" immediately following the meeting on the morning of February 4th. For purposes of deciding this case, it is not necessary for us to deal with the evidence regarding the circumstances of that meeting. However, it is noted that the evidence simply does not indicate a satisfactory reason why custody of the document was surrendered to "P5" in the first place. There was no suggestion that he was even to attempt to solicit signatures. If it was simply a matter of safekeeping, there was no indication why Mr. Payne could not retain it in his possession as he obviously did on the previous day. In these circumstances, failure to adduce

direct evidence as to what happened to the petition throughout the day on February 4th constitutes a material gap in the evidence required to discharge the onus of proving the voluntariness of the petition. On the basis of the evidence before us, we cannot be satisfied that the petition is voluntary and, accordingly, give it no weight.

14. The Board is, therefore, satisfied on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 6, 1987, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

3042-86-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Can-Eng Metal Treating Ltd., Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Applicant requesting a clarity note that the exclusion of technical staff in the bargaining unit description means only the two classifications in the technical group at the time of application - Board discussing its use of clarity notes - Clarity note not appropriate here

BEFORE: V. Solomatenko, Vice-Chair, and Board Members G. O. Shamanski and D. A. Patterson.

APPEARANCES: Wayne McKay, Clare Meneghini and Robert Savard for the applicant; Brian P. Smeenk, C. Cancilla, A. R. Neufeld and R. Ott for the respondent; Gary Prattis, Ron Prattis and John Adams for the group of employees.

DECISION OF THE BOARD; March 20, 1987

1. The name of the respondent is amended to read: "Can-Eng Metal Treating Ltd.".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. On the day of the hearing, the parties met with a Board Officer and reached partial agreement with respect to the description of the bargaining unit. The parties are in agreement that the unit should be described as all employees of the respondent at Kitchener, save and except "managerial personnel", office, sales and technical staff and employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period. However, the parties are not agreed as to who should be excluded as "managerial personnel" and whether there should be a clarity note regarding the exclusion for technical staff.

5. The respondent contends that the managerial exclusion should be restricted to the plant manager and persons above the rank of plant manager because the plant manager is its first or lowest level of management. The applicant's position is that the managerial exclusion should begin with foremen and persons above the rank of foreman. The respondent employs two individuals whom it classifies as "working foremen", William Fulton and Erwin Vogel. It is the respondent's position that Fulton and Vogel should be included within the bargaining unit because they are in fact working foremen, akin to lead hands, and do not exercise managerial functions. In view of this dispute, we appoint a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of these two individuals classified by the respondent as working foremen.

6. Counsel for the respondent further submits that, if the applicant succeeds in its claim that Fulton and Vogel are in fact the lowest level of management, the exclusion should be described as "working" foremen and persons above the rank of "working" foreman, not simply foremen as proposed by the applicant. The respondent's position is that it, in fact, classifies these individuals as "working foremen" and counsel relies on the Board's policy of not excluding non-existing classifications. We reserved on that issue at the hearing and note at this time that the expressions "working" and "non-working" foremen are usually found in the construction industry, whereas "lead hand" and "foreman" are prevalent in the industrial setting. If the parties are unable to reach agreement on the issue, however, it is more appropriate in these circumstances to defer its final determination until after the Board Officer's inquiry and report with respect to the duties and responsibilities of Vogel and Fulton.

7. Although the applicant agrees to an exclusion for technical staff, at the same time, it requests that the Board issue a clarity note that the exclusion for technical staff means only the two classifications of metallurgical engineer and technologist, which are the only classifications in the technical group at the time of application. We confirm our oral ruling at the hearing that such a "clarity" note is not appropriate. The Board's policy is to certify in terms of classes or generic groups of employees and that policy is conversely reflected in describing the exclusions from a standard unit. A standard office unit is described in terms of "all office, clerical and technical" employees. On the other hand, a production unit normally excludes office, clerical and technical employees if there were any employees in those categories at the time of application. Where necessary, a clarity note is used to express the parties' understanding whether specific individuals are included or excluded in respect of one of these categories. In the instant case, however, there is no dispute whether the two classifications fall within the category of technical employees. The sole purpose and effect of the "clarity" note requested by the applicant is to circumscribe the generic exclusion for technical staff to these two job classifications only. When the Board grants certification with respect to a group of employees such as "office" employees, it does not limit certification only to those classifications within the category of office employees existing at the time of certification. Similarly, where it excludes a generic group of employees from the bargaining unit, it does not normally limit the exclusion to those classifications existing at the time of certification.

8. The parties also disagree as to the inclusion of Clarke Eady on the list of bargaining unit employees. The applicant takes the position that this individual is not employed for more than twenty-four (24) hours per week on a regular basis and is therefore excluded from the bargaining unit. The respondent's position, on the other hand, is that Mr. Eady is regularly employed for more than twenty-four hours per week. The Board hereby authorizes a Labour Relations Officer to inquire into and report to the Board whether Clarke Eady is regularly employed by the respondent for more than twenty-four hours per week.

9. Regardless of the outcome of the previously noted challenges with respect to these

three disputed individuals, we are satisfied that the membership evidence filed by the applicant demonstrates a level of support amongst the bargaining unit employees in excess of that required under the Act for certification without having a representation vote taken. However, there was also filed with the Board three undated handwritten documents bearing the signatures of 18 persons, and 8 further documents each bearing a single signature. Six of the latter eight signatures are repetitious. These documents purport to be statements of desire to oppose the union's application (hereinafter referred to collectively as the "petition") which in total contain 20 different signatures. The Board is satisfied that the petition is relevant because there is sufficient overlap of signatures of employees who had signed both the petition and union membership cards as would cause the Board to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote, if satisfied that the petition is voluntary.

10. The applicant has also filed three documents dated February 14, 16 and 17, 1987, respectively, each bearing a single signature. These documents (hereinafter referred to collectively as the "counter-petition") purport to be reaffirmations of membership in the applicant union and repudiation of their signatures on the petition. All three individuals who signed the counter-petition had also signed the petition. Nevertheless, the overlap of these three signatures is not sufficient to reduce the number of signatures of employees who had signed both the petition and union membership cards to the level that the petition would no longer be relevant. In the circumstances, it is not necessary to inquire into the origination and circulation of the counter-petition and the Board will therefore inquire into the voluntariness of the petition only.

11. At this stage of the proceedings, counsel indicated that the respondent wished to raise two further matters of a preliminary nature. Counsel indicated that he had just learned on the day of the hearing of certain misconduct on the part of the applicant. Specifically, he referred to allegations of threats and misrepresentation by the applicant to the employees in the course of obtaining membership evidence. Counsel submits that these allegations, if proven, could invalidate the membership evidence such as to make even the petition irrelevant regardless of its voluntariness. He advised that the respondent would be filing charges promptly in this regard and submits that the same panel of the Board should deal with those charges as well as the other outstanding issues in this case.

12. Counsel for the respondent then raised an objection with respect to the applicant's letter dated February 23, 1987 which was filed with the Board prior to the hearing and which alleges misconduct on the part of the respondent and certain named employees. Counsel argues that the applicant should be precluded from adducing evidence with respect to the matters alleged in the letter of February 23, 1987 because those allegations are vague, lack particularity and, more importantly, were not filed in a timely matter. The letter of February 23rd refers to conduct on the part of the respondent on February 6th and February 9th. The applicant advises that it first became aware of the alleged misconduct on February 19th and took prompt action thereafter.

13. We confirm our oral ruling at the hearing that we do not agree that this is a case wherein the union should be precluded from leading evidence with respect to its allegations set forth in its letter of February 23, 1987. However, we agree that this is a proper case wherein the same panel hear the evidence and representations with respect to both parties' allegations of misconduct as well as matters related to the voluntariness of the petition. The matter is therefore adjourned and we direct that the respondent file its charges promptly. If the charges are filed in the form of a complaint under section 89 of the Act those proceedings are to be consolidated with this application. Should the respondent proceed by way of a section 89 complaint it is directed to advise the Registrar at the time of filing that it is in conjunction with the proceedings herein. Should the respondent require further particularity with respect to the applicant's allegations set forth in the let-

ter of February 23rd, it is directed to request them prior to the next hearing date in this matter. The applicant is directed to provide the petitioners with a copy of its letter of February 23, 1987.

14. The matter is referred to the Registrar to be set down for hearing in Kitchener to receive the parties' evidence and representations with respect to the voluntariness of the petition, the allegations of misconduct filed with the Board and all issues arising out of and incidental to those matters.

1737-86-M; 1738-86-M; 1739-86-M; 2096-86-M; 2097-86-M; 2098-86-M Doug Carter, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 27, Respondent Trade Union v. Highbury Ford Sales Limited, Respondent Employer; Ronald Alexander Marks, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 27, Respondent Trade Union v. Highbury Ford Sales Limited, Respondent Employer; David R. Scott, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 27, Respondent Trade Union v. Highbury Ford Sales Limited, Respondent Employer; Richard D. Harvey Applicant, v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 27, Respondent Trade Union v. Highbury Ford, v. Respondent Employer; Mike Tudor, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 27, Respondent Trade Union v. Highbury Ford, Respondent Employer; John Skillen, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 27, Respondent Trade Union v. Highbury Ford, Respondent Employer

Religious Exemption - Applicants members of the Harvester Baptist Church - Applicants found to be sincerely religious persons but beliefs not the cause of the objection to paying union dues - Opposition grounded in social and political views - Exemption not granted where the overall thrust of the objection is not religious in nature - Applications dismissed

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. Rundle* and *D. Patterson*.

APPEARANCES: *David R. Scott, Ronald A. Marks* and *Doug Carter* for the applicants; *L. A. MacLean, Q.C., Bud Bryant, Bert Rovers* and *Jim Shafton* for the respondent trade union; no one appearing for the respondent employer.

DECISION OF THE BOARD; March 5, 1987

1. The name of the respondent trade union is amended to read: "National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 27".

2. These cases involve six applications under section 47 of the *Labour Relations Act* requesting orders that the applicants be exempted from paying dues, fees or assessments to the respondent trade union because of their religious convictions or beliefs. David Scott, one of the applicants, acted as spokesperson for the group.

3. At the commencement of the hearing, the respondent union:

- a) moved to have the applications of those of the applicants who had not appeared dismissed;
- b) moved to have the applications of Mike Tudor, Richard Harvey and John Skillen dismissed on the basis that they did not disclose a *prima facie* case; and
- c) requested that the applications be heard separately and those of the applicants whose cases were not being heard at any given time be excluded from the hearing room.

4. After hearing the parties' submissions, the Board ruled orally as follows:

With respect to the respondent union's second motion, the Board is unanimously of the view that the application of Mike Tudor does not disclose a *prima facie* case for the remedy requested, and as a result, we are dismissing it without a hearing pursuant to Rule 71 of the Board's Rules of Practice.

We are also unanimous that the application of John Skillen does not suffer from the same defect and we decline to dismiss it without a hearing.

With respect to the application of Richard Harvey, the majority, Board Member Patterson dissenting, declines to dismiss it without a hearing.

With regard to the procedure of the hearing, we are also unanimous that these cases should be consolidated for hearing and that we are not prepared to exclude any of the applicants from any part of the consolidated hearings.

Finally, we are not prepared to dismiss the cases of Richard Harvey and John Skillen for non-appearance at this point since they have a representative here speaking on their behalf.

5. As it turned out, neither Mr. Skillen nor Mr. Harvey appeared at any point during the two days of hearings in these matters and no evidence was tendered with respect to their applications. The burden of proof in this kind of application is on the applicant to establish that he or she meets the criteria set out in section 47 (see *Helen Sarah Freedhoff*, [1982] OLRB Rep. Jan. 135), which Mr. Skillen and Mr. Harvey have failed to do. As a result, their applications are dismissed.

6. Turning to the three remaining applications, the parties were able to agree on the following facts.

7. The respondent trade union applied for certification for the bargaining unit in question in March of 1985. At that time there was a dispute with respect to the exclusion of two individuals from the bargaining unit which was resolved by means of an examination and a subsequent hearing. Both at the initial hearing into the certification application and at the subsequent hearing into

the examiner's report, David Scott, one of the applicants here, appeared as the spokesperson for a group of employees objecting to the certification of the union.

8. A representation vote was held on February 28, 1986 and in accordance with the outcome of that vote, the Board issued a certificate to the respondent trade union on March 13, 1986.

9. The union and the employer subsequently entered into a memorandum of settlement which was ratified by a vote held July 3, 1986 and incorporated into a formal collective agreement dated September 4, 1986. The respondent union agrees that these applications are timely.

10. The three remaining applicants each testified on their own behalf and that evidence, in conjunction with the respondent union's evidence, established the following facts.

11. The three applicants are employed as auto mechanics by the respondent employer in an area described as the mechanical shop. All three are also members of the Harvester Baptist Church in Lambeth which they founded, together with Mr. Scott's brother, some four years ago. Mr. Scott is the treasurer of this Church and Mr. Marks and Mr. Carter are deacons. The congregation which initially consisted of the immediate families of the founders has now grown to 25 members. The applicants have requested that their dues be directed to this Church which is a registered charity, rather than to the union. The Harvester Baptist Church is an independent Baptist church with no relationship to the Baptist governing body. It is common ground that the latter does not preach against trade union membership or collective bargaining.

12. Mr. Scott has been employed by the employer for some seven years. When the union applied for certification, he actively campaigned in opposition to the union, including circulating a petition and visiting employees at their homes to persuade them to vote against the union in the representation vote. Prior to this application, Mr. Scott had not expressed his objections to the union in religious terms.

13. Mr. Carter and Mr. Marks commenced working for the employer in June of 1986, after the union was certified but before a collective agreement had been signed. It appears that these three applications were to some extent a joint effort. The applicants met together to discuss what they were required to prove to obtain the religious exemption and to select the Bible passages and other references they would use in this regard. The applications were then typed by Mr. Marks' sister. There was some evidence that Mr. Scott had also been recruiting potential applicants for exemptions amongst other employees in the body shop area. The three applicants who did not appear at the hearing worked in the body shop.

14. Addressing Mr. Scott's application first, he told the Board that as a born again Christian, he believed that God held him responsible for everything he did and that if he allowed his money to support a union, in effect, he was supporting the goals of the union. In his view, this contravened the Charter of Rights. He particularly objected to the union supporting the New Democratic Party which he felt would lead to socialism. Mr. Scott also considers himself to be a patriot and objected to an article the union circulated suggesting that generals should have to run across the country on one leg to raise money for armaments.

15. Mr. Scott told the Board that he believed he had been given his job by God and that he had to try and be the best mechanic that he could be. In his view, unions protect people who do not want to work and he felt they would be the downfall of the country. As an example, he referred the Board to another employee working next to him whom he felt did not work as hard as he did and who should not be paid at the same rate. Mr. Scott was of the view that he himself would have received a larger pay increase in the absence of the union. The Board was referred to certain

Bible passages which Mr. Scott interpreted as proscribing the existence of a mediator between an employer and employees, a role he considered the union to be playing.

16. Section 47 provides as follows:

(1) Where the Board is satisfied that an employee because of his religious convictions or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

17. In *Helena Wybenga*, [1976] OLRB Rep. Aug. 422, the Board identified three questions which must be asked about the nature of a section 47 applicant's belief:

1. Are the beliefs sincerely held?

2. Are the beliefs religious?

3. Are the beliefs the cause of the objection to paying dues to the trade union?

18. In the case of Mr. Scott, we have no doubt that he is a sincerely religious person. The evidence makes it clear that he is a dedicated follower of a fundamentalist Christian sect and that he is both active in his Church's affairs and observant of the tenets of his religion as he perceives them.

19. However, the connection between Mr. Scott's religious beliefs and his objection to paying dues is a tenuous one. Although he is bitterly opposed to unions, that opposition appears to be grounded in a host of social and political views that are not directly traceable to his religious philosophy.

20. The majority of Mr. Scott's testimony was devoted to expounding upon those views, which were essentially secular in nature. As the Board pointed out in *Douglas N. Butler*, [1981] OLRB Rep. Sept. 1319, section 47 was not designed to provide relief for conscientious objectors or to accommodate social or political dissent. We are cognizant of the fact that it may seem cavalier to dissect an applicant's generalized perspective for the purpose of making legal distinctions which may not be either philosophically sound or in accordance with the applicant's own perceptions. Nevertheless, the Board cannot ignore the word "religious" in section 47 and must attempt to give it some content, as the Board noted in *Douglas N. Butler*, *supra*:

16. What the applicant is in effect asking the Board to do is to legislate the word "religious" out

of section 39 [now section 47] altogether. This is not an appropriate function for the Board. Compromising between freedom of religion and egalitarian support for a trade union obligated by law to represent all employees in a bargaining unit is a delicate social issue (cf. again, *Vis, supra*), and falls properly within the purview of the Legislature. Had the Legislature chosen to grant the objection simply on the basis of “personal conviction”, or “genuine belief”, or “matters of conscience”, it could easily have done so. But it did not. The section is not written simply for “conscientious objectors”. As the Ontario Court of Appeal observed in *Donald v. Hamilton Board of Education* (1945) 3 D.L.R. 424, in considering the meaning of “religion” under the *Public Schools Act*, at page 429:

The fact that the appellants conscientiously believe the views which they assert is not here in question.

17. The Legislature having chosen to limit the exemption to matters of “religious” conviction or belief, it is the task of the Board to ascribe some weight to that word, and to attempt to distinguish the “religious” from the “non-religious”. This becomes particularly cogent if the recently-enacted section 36a [now section 43], 1980, c. 34, s. 2(1), requiring the inclusion in a collective agreement, at the request of a trade union, of a provision effectively requiring all members of a bargaining unit to share equally the costs of their agent, is to maintain its integrity. It is the view of the Board that a conviction or belief, to be “religious” within the meaning of the section, must in some way relate to the more orthodox view of “religion” prevalent in the community. That is, the beliefs must relate to the Divine (in some form) and man’s perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men *inter se*. As the High Court of Australia noted in *Adelaide Company of Jehovah’s Witnesses Inc. v. The Commonwealth* (1943), 67 C.L.R. 122, at pages 123 and 124, in defining the statutory limits on freedom of religion:

It is true that in determining what is religious and what is not religious the current application of the word ‘religion’ must necessarily be taken into account.

This is not to say, of course, that moral precepts may not form an important part of any religion. As the Court observed in *Anderson*, 9 O.R. (2d) 341:

It is trite to say that in some circumstances, or with respect to some individuals, matters of morality might well be quite separate and distinct from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not for some individuals be an important element or tenet in the religious convictions or belief.

Indeed, it might be argued that religion has no greater importance than in the moral precepts which it imparts, and on the basis of which an individual carries out his daily life. The Board is simply observing that the use of the term “religious” in section 39 [now section 47] appears to require more than merely a code of behaviour or system of worldly standards, standing alone. As McRuer C.J.H.C. noted in dealing with the related word, “creed”, in *Trenton Construction Workers Association, Local No. 52 v. Tange Company Limited*, (1963) 63 CLLC ¶15,459:

Whatever meaning one gives to the word “creed” it must involve a declaration of religious belief. Religious belief, theology and standards of ethical or social conduct are all very different things.

Nor is it sufficient for an applicant simply to state that his worldly standards evolve from his concept of God and God’s will. It is the task of the Board to satisfy itself that this is the case.

21. To the extent that Mr. Scott provided some religious rationale for his anti-union beliefs, that rationale shifted over the course of the two days of hearings. Initially, he explained to the Board that it was the mediation role played by the union which conflicted with his interpretation of certain Biblical references. The following day he advised us that he was not opposed to union representation per se, but only to “closed shop” situations by which it appears he meant any mandatory dues deduction, whether or not union membership is required. While there is no requirement

that an applicant's religious views be consistent, in the context of this case we find the overnight shift in Mr. Scott's rationale undermines the credibility of his assertions with respect to the source of his opposition to paying dues.

22. Neither can we afford to ignore Mr. Scott's history of opposition to the union and his stated intention to continue to seek an end to union representation through the channels provided in the *Labour Relations Act*. In *Helen Sara Freedhoff, supra*, the Board commented at page 143 on the level of scrutiny it applies where there is a history of opposition to the union:

20. ...As pointed out in *P.C.L. Packaging Ltd.*, [1980] OLRB Rep. Oct. 1514, where there has been a history of union opposition, the skepticism of the trade union to an application of this sort is understandable, and the Board must view the matter with great care. Indeed, it would do nobody interested in the integrity of the legislation and of the procedure any good if the section could be used by those whose objection to paying dues to a trade union was based on considerations which could not be considered to be religious in any sense. The legislation was not intended to allow all of those who object strongly to trade unions to avoid their contractual obligations.

23. In conclusion, while we do not doubt that Mr. Scott is a sincerely religious person, we are not satisfied that his religious views are the source of his opposition to paying dues. Consequently, his application is dismissed.

24. Turning next to Mr. Carter's application, he testified that he became a born again Christian in 1981 and that he believes the Bible is the inspired word of God. Like Mr. Scott, he feels that a union should not come between him and his employer. Mr. Carter told the Board that when he saw dues deductions coming off his paycheque even though he had not voted for the union, he felt that his freedom had been infringed upon. In his view, that has a religious connection because he did not feel that way before he became a born again Christian. Mr. Carter agreed that he did not object in principle to a union representing a person unjustifiably treated or fired and that he would also be prepared to join a committee that protected employees from accidents and looked after their welfare.

25. While we are again persuaded that Mr. Carter is an observant follower of his faith, the link between that faith and his opposition to paying dues is unclear. It appears that he considers his opposition to be religious primarily because his views in this regard developed after his conversion. Mr. Carter advised the Board that he had not thought much about unions or politics prior to becoming a born again Christian.

26. The Board noted in *Helen Sarah Freedhoff, supra* (at page 144), that the fact that a religious person holds beliefs do not necessarily make those beliefs religious:

The Board does not accept that all beliefs and convictions held by a religious person are necessarily religious beliefs and convictions. A religious person may believe that the world is flat but that belief, like any other belief which does not obviously relate to God and things Divine, must be examined to determine whether it is in fact religious insofar as that particular believer is concerned.

27. We cannot conclude on the evidence before us that simply because Mr. Carter's opposition to paying dues alone after his religious conversion, the latter was the cause of the former. This is particularly so because it is not clear whether his anti-union views followed rapidly upon his conversion or evolved over a period of time.

28. Moreover, the connection offered by Mr. Carter between his religion and his opposition to trade unions was very limited and was further pared down in cross-examination. In light of the

evidence with respect to the joint origination of the applications, the diffidence in Mr. Carter's testimony, and the contrast in the demeanors of Mr. Carter and Mr. Scott, it is difficult to avoid the conclusion that Mr. Carter was influenced by Mr. Scott in putting forward his claim for exemption. As a result, we find Mr. Carter's assertions less reliable as an expression of his own views.

29. In conclusion, we are not persuaded that Mr. Carter's religious beliefs are the cause of his opposition to the paying of dues and his application is also dismissed.

30. Mr. Marks' application is a more difficult matter. He testified that he became a born again Christian approximately four years ago and since that time has based his beliefs on the Bible which he considers to be the word of God. Like the other applicants, he too feels that the role of the union as an intermediary is in conflict with certain references in the Bible. He also interprets an injunction that servants obey their masters as applying to an employment situation.

31. Mr. Marks advised the Board that he objected to the fact that the union newsletter supported the New Democratic Party and that, in his view, the goals of the New Democratic Party were in conflict with his religious beliefs. However, he did note that he was opposed to unions before he became a born again Christian because of his perception with respect to what unions had done to the economy and to the social structure of Great Britain. He believes that letting employees "have their way" is undesirable and that a person who wants a good wage should work for it. He is firmly of the view that it is not fair for an employee who does good work to earn the same wages as others who work less well.

32. Mr. Marks explained that in Great Britain, the frequency of strikes in the news had "turned him off" unions completely and that he found it difficult to understand why people would be out parading the streets instead of keeping the jobs that they had. Mr. Marks advised the Board that before his conversion, his anti-union views were personal; after being saved, they were related to the teachings of the Bible.

33. Once again, we conclude without hesitation that Mr. Marks is an earnest and sincerely religious person who is observant of the precepts of his creed. But again, the evidence, on balance, fails to establish a causal connection between his religious beliefs and his opposition to paying dues.

34. Of the three applicants, Mr. Marks' religious beliefs were the most articulately expressed, and there is no doubt that they were *bona fide* and deeply felt. However, his opposition to unions appeared to have its primary source in a specific social and economic philosophy that was only marginally related to his religious beliefs. Given our comments earlier with respect to the religious qualification in section 47 and the views of the Board in *Douglas N. Butler, supra*, this distinction is critical.

35. Although Mr. Marks' religious rationale was more cogent than that of his fellow applicants, the Board has noted previously that the exemption should not be granted where the overall thrust of the objection is not religious in nature. In *Helen Sarah Freedhoff, supra*, the Board said at page 146:

...there never was any legislative intention that the exemptions should be granted automatically whenever an applicant could point to an apparent religious belief or conviction on which to base an objection, when the general overall thrust of the objection was not religious in nature. It is our view that when the overall thrust of the objection is seen not to be religious, the objection cannot be characterized as being "because of [the applicant's] religious conviction or belief" within the meaning of section 47. The presence and relative importance and weight given to the obviously non-religious reasons must be considered, based on the evidence in each case. In this

case, it is our view that the evidence indicates that the non-religious reasons were so important to the applicant that they must be considered as so colouring the application as to be the cause of the objection. The overall importance of those other reasons is such that the real importance of the religious convictions and beliefs in the context of the objection is hard to assess, and so one cannot be satisfied that the objection is because of the religious conviction or belief. It should be noted that the burden is on the applicant to satisfy the Board, on balance, that section 47 relief should be granted, and that the applicant is not entitled to the benefit of any doubt.

In this case, we find that the overall thrust of Mr. Marks' objection to paying dues is not religious. Like the other applicants, we conclude that he has rationalized his general objections to trade unions in terms of the religious beliefs (see *University of Windsor*, [1979] OLRB Rep May 458). As a result, his application is also dismissed.

36. In summary, we have found that all three applicants have not established that they meet the conditions of section 47, and that they are accordingly not entitled to be exempted from the payment of any dues, fees or assessments to the respondent union.

2465-86-R; 2466-86-R; 2990-86-M International Brotherhood of Painters and Allied Trades, Local 1824, Applicant v. **Consolidated Aluminum (Maritimes) Ltd.**, Respondent; International Brotherhood of Painters and Allied Trades, Local 1824, Applicant v. Consolidated Aluminum & Glass Corp., and Consolidated Aluminum (Maritimes) Ltd., Respondents; International Brotherhood of Painters and Allied Trades, Local 1824, Applicant v. Consolidated Aluminum & Glass Corp., and Consolidated Aluminum (Maritimes) Ltd., Respondents

Settlement - Board will only make a declaration, direction or order pursuant to a settlement if there is express agreement that it do so and if the Board has jurisdiction to do so - Use of phrase "endorse the record" in minutes of settlement discouraged

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *C. A. Ballentine* and *F. C. Burnet*.

DECISION OF THE BOARD; March 24, 1987

1. Board File 2465-86-R is an application under section 63 of the *Labour Relations Act* ("the Act") for a declaration that there has been a sale of a business by Consolidated Aluminum & Glass Corp. to Consolidated Aluminum (Maritimes) Ltd. Board File 2466-86-R is an application under subsection 1(4) of the Act for a declaration that the respondents constitute one employer for the purposes of the Act. Board File 2990-86-M is a referral of a grievance under section 124 of the Act.

2. The parties to these proceedings have entered into the following Minutes of Settlement in these matters:

MINUTES OF SETTLEMENT

WHEREAS the applicant has filed three applications with the Board as above referred to.

AND WHEREAS the parties have agreed to settle all outstanding issues raised by the above mentioned complaints.

The parties therefore agree as follows:-

1. That the respondent, Consolidated Aluminum and [sic] Glass Corp. is bound to the collective agreement effective June 2nd, 1986 between Architectural Glass and Metal Contractors Association and the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, hereinafter called the "agreement".
2. That the respondent, Consolidated Aluminum and [sic] Glass Corp. has violated the "agreement" by hiring non-union employees at Tranquility Retirement Home in Brantford.
3. That the Ontario Labour Relations Board shall order the respondent, Consolidated Aluminum & Glass Corp. to pay to the applicant the sum of \$7,000.00 within 60 days from February 16th, 1987 in full and final settlement for the above violation of the collective agreement, and the respondent, Consolidated Aluminum Glass Corp. [sic] hereby agrees to pay to the applicant the said sum of \$7,000.00 within 60 days from the 16th day of February, 1987.
4. The parties to have the above mentioned Minutes of Settlement including the order to pay endorsed by the Board and [sic] its awards in these matters.

3. As there seems to be some confusion on the point, we think it important to note that the Board does not "endorse" Minutes of Settlement in the sense of approving them or lending them some legal effect they do not already have as a result of the parties' having entered into them. The Board will "endorse the record" with Minutes of Settlement by reproducing the text of the Minutes of Settlement in the decision by which it disposes of the matters settled, as we have done in paragraph 2 of this decision. If the parties have expressly agreed that the Board should issue a particular declaration, direction or order, and if the Board has the jurisdiction to do so, the Board will "endorse the record" in accordance with that particular agreement by including the agreed upon declaration, direction or order in its decision disposing of the matters settled. In the past, the Board might have converted the language of settlement agreements into specific Board orders in response to requests "that the Board endorse the record with these Minutes of Settlement", "that these Minutes of Settlement be issued as a decision of the Board", "that the Board issue the appropriate orders" and other equally general and ambiguous language. Generally speaking, it will no longer do so: see *Elmont Construction Limited*, [1987] OLRB Rep. Feb. 209 and *N. D. Barbeau Mechanical Limited*, Board File 0393-86-M, dated February 23, 1987, unreported.

4. Recognizing that there are differences, both legal and otherwise, between agreeing to do something and agreeing to be ordered to do it, and that settlement agreements can result in contractual obligations which could not be the subject of an order by this Board, the Board will not interpret mere agreement that the Board "endorse the record" with the Minutes of Settlement as licence or implied authority to convert the terms of Minutes of Settlement into declarations, directions or orders. The Board will only make a declaration, direction or order if there is *express* agreement that it do so and, even then, only if the Board has the jurisdiction to do so. Participants in the settlement of referrals under section 124 would be well advised to purge the phrase "endorse the record" from the language in which they couch Minutes of Settlement. When Minutes of Settlement recite that proceedings are thereby settled, but do not expressly provide that the Board make particular declarations, directions or orders, the only order the Board will make is an order terminating the proceedings.

5. Having regard to the express agreement of all parties affected, the Board orders that Consolidated Aluminum and Glass Corp. pay to the applicant the sum of \$7,000.00 within 60 days from February 16, 1987. These proceedings are otherwise terminated.

1856-83-R; 2087-83-M Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Applicant v. **E K T Industries Inc.**, Respondent v. International Union of Operating Engineers Local 793, Intervener #1 v. United Brotherhood of Carpenters and Joiners of America, Local Union 1669, Intervener #2 v. Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607, Intervener #3; Labourers International Union of North America, Ontario Provincial District Council; and Labourers International Union of North America, Local 607, Applicants v. **E K T Industries Inc.**, **Tamarron Group Inc.**, **Tamarron Construction Limited**, Respondents

Accreditation - Bargaining Rights - Certification - Construction Industry - Applicant union evolving from an industrial into a construction trade union representing construction labourers - Union an affiliated bargaining agent based on established trade union practice but not part of an employee bargaining agency - Whether applicant entitled to represent construction labourers employed by respondent - Board discussing mandatory system of province-wide bargaining in the construction industry

BEFORE: *D. E. Franks*, Vice-Chair, and Board Members *J. Wilson* and *B. L. Armstrong*.

APPEARANCES: *L. C. Arnold* and *Eric Hautala* for Lumber and Sawmill Workers Union, Local 2693; *S.B.D. Wahl*, *P. Little* and *D. Strang* for Labourers Local 607; *R. J. McComb*, *James M. Sinclair* and *Denis Magne* for **E K T Industries Inc.**; *Harold F. Caley* and *N. Jesin* for Carpenters Local Union 1669, International Union of Operating Engineers Local 793, Millwrights Local Union 1151, and Ironworkers Local Union 759.

DECISION OF THE BOARD; March 27, 1987

INTRODUCTION

1. Board File No. 1856-83-R is an application for certification by Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as "Lumber and Sawmill Workers Union, Local 2693" or simply "Local 2693") for certain employees of **E K T Industries Inc.** (hereinafter referred to as "**E K T**"). That application was made pursuant to the construction industry provisions of the Act on November 10, 1983. Prior to the terminal date in that application, the Labourers Provincial District Council and Labourers Local 607 (hereinafter referred to as "Labourers Local 607") intervened claiming bargaining rights for those employees. Those interveners, that is, both the Council and Labourers Local 607 also filed (on December 6, 1983) a referral of a grievance to arbitration by this Board pursuant to section 124 of the Act. That referral names as respondents **E K T Industries Inc.**, **Tamarron Group Inc.**, and **Tamarron Construction Limited**. That proceeding requests certain remedies pursuant to section 63 and or section 1(4) of the Act. The two matters were consolidated and heard together.

2. Initially, these cases involve a determination as to which of two competing trade unions Lumber and Sawmill Workers Union, Local 2693 or Labourers Local 607 holds successor or related employer bargaining rights with respect to certain of the employees of the respondent **E K T**. Simply put, Labourers Local 607 claims to represent construction labourers through its provincial agreement with **Tamarron Group Inc.** Lumber and Sawmill Workers Union, Local 2693 seeks

to represent construction labourers through bargaining rights it held with a company called Kamtar. As will be noted, Lumber and Sawmill Workers Union, Local 2693 also applied for certification with respect to certain of the employees of E K T. Questions concerning the appropriate bargaining unit led to the intervention of a number of other local trade unions in these proceedings.

3. In the course of hearing the evidence and representations of the parties on these section 63 and 1(4) matters, counsel for Labourers Local 607 raised certain issues with respect to the status of Lumber and Sawmill Workers Union, Local 2693 to apply for or hold the bargaining rights in question. The issue raised by counsel stems from whether or not Lumber and Sawmill Workers Union, Local 2693 is an affiliated bargaining agent as defined by section 137(1)(a) of the Act. If it is such an affiliated bargaining agent, then the question arises whether that affects Lumber and Sawmill Workers Union, Local 2693's status given those sections of the Act dealing with the mandatory provisions concerning province-wide bargaining for certain trade unions in the construction industry. The intervening trade unions in these proceedings played an extensive part in that portion of the proceedings dealing with the "affiliated bargaining agent issue".

4. The following decision therefore deals with two extremely complex problems. A rather unusual section 63 and 1(4) proceeding where two unions claim bargaining rights by a history of a relationship with the employer, and the more complicated and difficult affiliated bargaining agent issue. These issues involved large amounts of oral and documentary evidence and extensive representations by counsel to this Board. Indeed, the Board conducted at least 37 days of hearings, most of which were in Thunder Bay. Before we deal with these matters in detail, it is appropriate at this point for the Board to express its thanks to counsel for their assistance in these problems, particularly in those uncharted waters relating to the status of Lumber and Sawmill Workers Union, Local 2693 as an affiliated bargaining agent.

THE SECTION 63/1(4) ISSUES

5. Lumber and Sawmill Workers Union, Local 2693 claims to represent certain employees pursuant to section 63 or section 1(4) as a consequence of its bargaining relationship with a company called Kamtar Construction Limited (hereinafter referred to as "Kamtar"). Kamtar was a small mechanical contractor owned and operated by former employees of Comstock who had operated in the Winnipeg and Thunder Bay areas. The company was based in Winnipeg. A Mr. Herzog was located there and was the president. Mr. Ronald Turchyn and Mr. Denis Magne were in charge of the Ontario operation of Kamtar. Mr. Magne primarily in Thunder Bay and Mr. Turchyn primarily in the Fort Frances area. Kamtar's business in Ontario was essentially related to mechanical contracting in relatively small jobs on the various mill sites throughout Northwestern Ontario. Kamtar was incorporated in 1979 and from about that time to the time of its demise it had collective agreements with a number of unions, and in particular the Lumber and Sawmill Workers Union, Local 2693.

6. In the spring of 1983, primarily as a result of its pipe fabrication operation in Winnipeg, Kamtar found itself in financial difficulties. It was clear that the pipe shop was not succeeding and it became the intention of Messrs. Magne and Turchyn to divorce themselves from the Manitoba operation and continue operating in Ontario. At this time, Mr. Magne met Mr. James Sinclair and discussions were entered into by Mr. Magne and Mr. Sinclair concerning the future of Kamtar.

7. We shall shortly turn to discuss Mr. Sinclair's business interests at the relevant times. However, it is of central importance in this part of the case to note that while Mr. Magne and Mr. Sinclair's initial discussions took the form of a merger of Kamtar and "Tamarron" as was suggested by counsel for the respondent employer, that does not appear to be what in fact eventually occurred. Counsel for the employer argued that the evidence concerning the relationship between Kam-

tar, Tamarron and E K T was such that E K T was the result of the merger of Kamtar and Tamarron. As we note, that may have been the shape of the initial discussions between Magne, Turchyn and Sinclair but it was certainly not what eventually happened. In a word, Kamtar's bankers wouldn't go along with the proposal. What did in fact happen was that the Northland Bank, through a form of receivership, seized the vehicles and equipment of Kamtar and in turn Mr. Sinclair (or more correctly T-2 Rentals) purchased those assets from the Northland Bank. Kamtar's operations were wound down and Mr. Sinclair changed his business plans. Mr. Sinclair in effect funded E K T and Mr. Magne and Mr. Turchyn became employees of E K T who may or may not eventually be entitled to purchase equity in that company, but at all material times in these matters the sole owner of E K T appears to have been Mr. Sinclair (or more specifically a Sinclair trust). In summary then the claim of Lumber and Sawmill Workers Union, Local 2693 to bargaining rights with respect to the employees of E K T arises solely from the fact that T-2 Rentals is related to E K T and that T-2 Rentals purchased the equipment of Kamtar, and such equipment is now being used by E K T. Clearly, neither Sinclair nor E K T purchased the Ontario "operation" of Kamtar as an operating business.

8. We now turn to examine the relationship between E K T and "Tamarron". The first Tamarron Corporation Limited was incorporated as a construction company in 1974. It subsequently was changed to an equipment rental company and became T-2 Rentals. It has apparently always been owned by Sue Sinclair and Fern Garner. Tamarron Construction Limited replaced Tamarron Corporation as a construction company in 1975. Ownership of Tamarron Construction Limited was 45 per cent Sinclair family trust, 45 per cent Comden family trust and 10 per cent James Childs. In June of 1980 a company called Tamarron Group Inc. was incorporated. The ownership of that company was 73 per cent by the Sinclair family trust and 27 per cent by Ken and Jan Mills. The Tamarron Group Inc. Company was the project manager and general contractor on a 350 million dollar modernization project of the Great Lakes Mill in Dryden, Ontario. It is clear on the evidence that the connection between these three companies is Mr. James Sinclair, who in fact runs the various "Tamarron" operations. In December, 1982 Tamarron Group Inc.'s contract was terminated at Dryden. In May of 1983 there was little or no activity amongst the "Tamarron" companies. The evidence is that Mr. Sinclair had at that time been negotiating to acquire a 50 per cent interest in a company called North West Structural Steel. As a result of the eventual establishment of E K T he limited his purchase in that operation to some 20 per cent. As we have noted Kamtar was a small mechanical contractor, whereas by this time "Tamarron" (certainly the Tamarron Group Inc.) was a substantial general contractor.

9. Mr. Sinclair's evidence is that he did not do mechanical work because he did not have an agreement with the local of plumbers union (U.A.) by virtue of a disagreement with the local plumbers' business agent over the use of ironworkers to install pipe supports. From his point of view then, merging with Kamtar in order to obtain mechanical contracting capability was a justifiable business expansion. However, as we have also noted earlier, the financial collapse of Kamtar was such that Messrs. Magne and Turchyn were still liable for certain debts of Kamtar and could not obtain the clearances from the banks to use the Kamtar name in any merger with Sinclair. The result was that the merger did not go through.

10. Rather, Sinclair put up the "start-up" money for E K T and the Sinclair Business Trust became the sole owner of E K T. Magne and Turchyn simply became employees, albeit managers in the newly formed E K T. Counsel for the employer E K T took the position that Magne's and Turchyn's interest in E K T was much larger than this. It is not necessary nor would it be proper for us to comment on these matters, it is sufficient that at all material times in these proceedings they were in effect employees of Mr. Sinclair.

11. Indeed, Sinclair's connection with E K T was known in the business community. Thus, the very first job that was performed by E K T was a job which had initially been scheduled for Kamtar to do at the Boise Cascade Mill in Fort Frances. By this time Kamtar was defunct and it was proposed that E K T do the job. Ultimately, however, Boise Cascade required that the papers on that job be signed by Tamarron Construction. That is to say, Boise, as owner/purchaser of the work in question, treated E K T as a Sinclair operation notwithstanding it was a new company. Indeed, it appears as well that Local 607 Labourers worked on that job.

12. Detailed evidence was given concerning the initial jobs which were performed by E K T. It is not necessary for us to go into much detail concerning those jobs at this point except to note that it was the clear evidence of Mr. Magne that the mechanical work that E K T was engaged in, although similar in nature to the work Kamtar had been engaged in was now of a much large scale, since the bonding capabilities of E K T were much larger than that of the defunct Kamtar. Thus, it would appear that by the time of these applications Mr. Sinclair had assembled a company with reasonably large construction capabilities in both civil and mechanical capabilities. These applications arose when E K T got its first large civil construction job in the Lakehead area. At that time Mr. Sinclair was apparently approached by Mr. Little concerning the application of Labourers Local 607's bargaining rights which it had won as a consequence of displacing Lumber and Sawmill Workers Union, Local 2693 as bargaining agent for the Tamarron Group at the large Dryden project. It appears that the response of E K T to this request from Mr. Little was that Mr. Magne went to the Lumber and Sawmill Workers Union, Local 2693 office and signed a voluntary recognition with Lumber and Sawmill Workers Union, Local 2693. Subsequently, Lumber and Sawmill Workers Union, Local 2693 applied for certification for the employees covered by that voluntary recognition.

13. In view of these foregoing findings, one can now clarify the problem faced by the Board in the application of sections 63(1) and 1(4) with respect to the two unions. Lumber and Sawmill Workers Union, Local 2693 has a claim through its relationship with Kamtar and E K T's purchase through T-2 Rentals of the working assets of Kamtar. On the other hand, Labourers Local 607 has a claim arising by sections 63 and 1(4) that E K T is the successor employer or related employer to Tamarron Group Inc. through the ownership and the conduct of Mr. Sinclair. The matter, however, for the Board is complicated by two factors. First, both the collective agreements have hiring hall provisions. Thus, although under section 63 of the Act, the Board can conduct a vote to determine the wishes of employees, it seems to us questionable to hold a vote in circumstances where the employer is bound to two collective agreements which have hiring hall requirements. Certainly, once the hiring hall requirement is complied with, the vote is for all intents and purposes decided. The second complication in the present case is a result of the fact that by its conduct the employer E K T, by going to the Lumber and Sawmill Workers Union, Local 2693 and using Lumber and Sawmill Workers Union, Local 2693 to supply men to the job sites at the time of these applications appears to have chosen one union over the other. In such circumstances, we have even more difficulties with the availability of a representation vote as a mechanism to dispose of the issues before the Board. With this conundrum before the Board counsel for Labourers Local 607 raised certain issues concerning Lumber and Sawmill Workers Union, Local 2693 and its relationship to the province-wide bargaining provisions of the Act (sections 137 to 151). That matter became known as the affiliated bargaining agent issue or in shorthand the A.B.A. issue and we turn now to deal with it.

WHETHER OR NOT LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 IS AN AFFILIATED BARGAINING AGENT

14. Counsel for Lumber and Sawmill Workers Union, Local 2693 stated in argument that

that union local is an anomaly in the construction industry in Ontario. In the present case we shall examine the relationship between that anomaly and the mandatory system of province-wide bargaining in the construction industry which is set out in sections 137 to 151 of the Act. Before dealing with that issue however there are two problems of a background nature which must be examined.

15. In this case and indeed from 1980 on, it appears that the two unions involved in this matter, Lumber and Sawmill Workers Union, Local 2693 and Labourers Local 607 are trade unions competing to represent the same group of construction labourers in the same area. This leads to a problem with bargaining that was quite adequately expressed by Mr. Little, the business manager of Local 607, in his evidence. He realized in the 1980 round of negotiations that the employer representative sitting opposite him at the bargaining table had Mr. Little and Mr. Little's union in a very difficult position. Since that representative also bargained with Lumber and Sawmill Workers Union, Local 2693 for a collective agreement that covered the same employees locally as Mr. Little's agreement, the employers really didn't want to settle, they really wanted a strike, since during that strike the Lumber and Sawmill Workers Union, Local 2693's collective agreement could be used. No doubt, Lumber and Sawmill Workers Union, Local 2693 when it bargained was under an analogous pressure. It is clear on the collective agreements entered before the Board in this case that the two unions involved are engaged in a bidding war giving up benefits in return for work for their members. It is difficult to see how either union in such circumstances can fulfill its obligation as an effective bargaining agent.

16. The second background matter that has to be noted at this time is a far more complicated one. Lumber and Sawmill Workers Union, Local 2693 although clearly affiliated with the Carpenters Union is not a construction union in and of itself and it is not a construction craft or a construction "trade" union. Rather, Local 2693 has always been characterized by this Board as being an industrial union that through its practice operates in the construction industry. There have been other examples of industrial unions in construction, such as the Christian Labour Association of Canada. As an industrial union, Lumber and Sawmill Workers Union, Local 2693 *is not entitled to a finding that the appropriate unit for certification is limited to the trade or group represented by it*. That is to say, Lumber and Sawmill Workers Union, Local 2693, like any industrial union, is required in the construction industry to represent primarily an "all employee" bargaining unit, and indeed, the early certificates granted to Lumber and Sawmill Workers Union, Local 2693 and its standard collective agreement with the Thunder Bay Construction Association reflects this "all employee" type of bargaining unit. As we shall see, however, that does not turn out to reflect the facts of the matter.

17. This leads to a practice which was described by counsel for Labourers Local 607 in the course of its proceedings as Lumber and Sawmill Workers Union, Local 2693 "playing Santa Claus with bargaining rights". It is clear on the evidence, that with respect to any of the other construction trades, Lumber and Sawmill Workers Union, Local 2693 does not claim an "all employee" bargaining unit, but rather, simply a unit solely of construction labourers. The only construction union they will not recognize as having a legitimate claim is Labourers Local 607. While the language of Labourers Local 607's counsel may be a little strong, the matter nevertheless is very disturbing to this Board. It seems to us that in applying for bargaining units, although the Lumber and Sawmill Workers Union, Local 2693 purports to act as an industrial union, they have over the years been less than candid with the Board when dealing with what constitutes "all employees". Thus, for instance, in the present case it was noted earlier that a voluntary recognition was signed between Lumber and Sawmill Workers Union, Local 2693 and E K T. That agreement is on its face an "all employee" agreement "except for subsisting collective agreements". It is clear in the present case that *there were no subsisting collective agreements at the time the voluntary recognition*

was signed. Thus, when the two other carpenters' locals representing carpenters and millwrights and the operating engineers local and ironworkers local subsequently signed collective agreements with E K T, it would appear on the face of the documents before this Board that E K T had no right to sign such collective agreements, it had already signed an all employee agreement with Lumber and Sawmill Workers Union, Local 2693. Lumber and Sawmill Workers Union, Local 2693, however, takes the position that it doesn't want to represent carpenters, millwrights, ironworkers or equipment operators with respect to E K T. How this can be accommodated is of great concern to the panel in this case.

18. As we have noted earlier Lumber and Sawmill Workers Union, Local 2693 has been described as an anomaly in relation to normal representation in the construction industry. We shall now turn to examine how that anomaly came into being. Lumber and Sawmill Workers Union, Local 2693 as a division of the United Brotherhood of Carpenters and Joiners of America is an industrial trade union dealing primarily with woodlands operations. Thus, in the area of Northwestern Ontario Lumber and Sawmill Workers Union, Local 2693 represents a number of employees related to the Forest Industries. Indeed, it is this background in woodlands operations that led to the initial relationship with the construction industry. In the 1940's and indeed up until recent times, both woods operations and construction operations were highly seasonal industries. The woods were cut primarily in the wintertime whereas construction was done primarily in the summertime. Because the work was in opposite seasons it is not surprising then that a number of employees would work the woodlands in winter and construction in the summer, and Lumber and Sawmill Workers Union, Local 2693 representing these employees in the woodlands was prepared to represent the same employees in construction.

19. The first hint of any antagonism between Lumber and Sawmill Workers Union, Local 2693 and the Labourers International Union comes in 1947 at which time Ontario Hydro assigned the work of clearing Hydro's right of ways to members of the predecessor of the Labourers Union rather than to local Lumber and Sawmill Workers Union, Local 2693's members. This was done by virtue of arrangements that Ontario Hydro had with the Hod Carriers International Union. This was a source of some major resentment by the Lumber and Sawmill Workers Union, Local 2693 and, indeed, that resentment was still apparent in the hearing in this matter almost 40 years later.

20. By the mid-fifties the construction industry in Northwestern Ontario was such that a number of the other building trades unions were organized by their various crafts but the industry was not totally organized. One group, however, that does not appear to have been organized in Northwestern Ontario at that time were the Labourers. Thus, for instance, a general contractor might have a collective agreement with carpenters for carpenters but no collective agreement with any trade union for the labourers on the job. This created real problems for the existing unions that had organized in the area and lead to a pressure to organize the "unorganized" or "unrepresented" on construction. This in turn lead to an invitation to the Labourers International to organize the unorganized.

21. The Board heard part of the evidence concerning this famous organizing campaign of the mid-fifties and there was filed with the Board a number of Board decisions from that era. It appears there developed a battle between Lumber and Sawmill Workers Union, Local 2693 and the Labourers Union at that time, and when the dust settled after a series of lengthy Board proceedings, the Board struck down a voluntary recognition agreement between the Labourers International and the local Lakehead Builders' Exchange and in turn the Board certified Local 2693 as the bargaining agent for an industrial bargaining unit of construction employees. It is not for us to review or comment on the outcome of these cases. Clearly, however, they were the origin of Local 2693 as a construction union. That bargaining unit from the 1957 decisions is indeed the bargaining

unit that still exists in the collective agreement with the Thunder Bay Contractors Association and reads as follows:

The employer recognizes the union as the sole collective bargaining agent for all employees employed by the employer on all projects within the geographic district of Thunder Bay, Kenora, (including the Patricia portion), Rainy River, save and except: foremen, persons above the rank of foreman, office staff, timekeepers and persons bound by subsisting collective agreements to which the employer is a party to [sic].

22. There was filed with the Board a complete history of the bargaining relationship between Lumber and Sawmill Workers Union, Local 2693 and the various employers in the construction industry since the group of certification cases in 1957 which lead to Lumber and Sawmill Workers Union, Local 2693 being a bargaining agent in the construction industry. Since 1957, when Local 2693 was certified for a number of contractors in the Thunder Bay area, Lumber and Sawmill Workers Union, Local 2693 regularly negotiated a standard area collective agreement with originally the Lakehead Builders' Exchange and subsequently the Thunder Bay Construction Association. In that sense, apart from the problems raised by the "all employee" unit and references in the bargaining unit to subsisting "collective agreements", Lumber and Sawmill Workers Union, Local 2693 for the Thunder Bay area has since the mid-fifties acted like a construction industry *trade union* with respect to its construction industry employees, particularly, as we have noted in terms of bargaining at regular intervals, standard area agreements applicable to any contractor employing persons covered by that collective agreement which is conduct peculiar to construction trade unions.

23. In 1959 Labourers Local 607 raided Lumber and Sawmill Workers Union, Local 2693 for "tendering" or helper employees of the masonry and plastering contractors in the Lakehead area. These raids were successful and as a result Labourers Local 607 negotiated standard agreements with the local Construction Association for plasterer tenders and mason tenders.

24. Furthermore, over the years, the relationship between Lumber and Sawmill Workers Union, Local 2693 and the various other trades has not been stagnant. Thus, as the ironworkers and the operating engineers became better represented in the Thunder Bay area the Lumber and Sawmill Workers Union, Local 2693 allowed the relevant unions to "claim" their relevant tradesmen. Lumber and Sawmill Workers Union, Local 2693 claims the odd person that might fall within the equipment operators bargaining unit, but then the same can probably be said for Local 607 of the Labourers.

25. Of interest and of some import in this case is the relationship between Lumber and Sawmill Workers Union, Local 2693 and its sister Local 1669, the Carpenters Local of the United Brotherhood of Carpenters and Joiners of America. In particular at one point, it would appear that divers were represented by Lumber and Sawmill Workers Union, Local 2693 pursuant to the standard Lumber and Sawmill Workers Union, Local 2693 agreement with the Builders' Exchange. These tradesmen were claimed by Carpenters Union Local 1669 and the matter was settled by the International and by Local 2693 ceding the work to the Carpenters local.

26. The next major event in our chronology is really a change in the Board's policy towards industrial unions like Lumber and Sawmill Workers Union, Local 2693 in the construction industry. In 1965 the Board started to obtain limited jurisdiction with respect to jurisdictional disputes primarily in the construction industry and the Board decided that in order to cut off or foreclose the arising of jurisdictional disputes, it would cease to certify bargaining units in construction using the "all employees" formula which it had used with Lumber and Sawmill Workers Union, Local 2693 and other industrial unions up to that time. (*Winter & Son Limited*, [1967] OLRB Rep. Feb.

889.) The Board instead developed a policy of setting out the trades at work on the date of the making of the application. The effect for Lumber and Sawmill Workers Union, Local 2693 of this policy was that, since other unions were active in the area and claiming to represent tradesmen in other classifications that the typical certificates granted to Lumber and Sawmill Workers Union, Local 2693 from the mid-sixties on are certificates for construction labourers and only for construction labourers since everybody else tended to be represented by other unions by that time.

27. By 1978 when the provincial bargaining legislation came into effect the situation in the Thunder Bay area concerning the representations of construction labourers seems to be as follows. The Labourers International Union represented construction labourers on Ontario Hydro sites and pipelines and mason tenders generally, whereas Lumber and Sawmill Workers Union, Local 2693 appeared to represent labourers in what would normally be considered the industrial, commercial and institutional sector and residential sector of the construction industry (except for mason tenders). It seems to us clear that by 1980 Lumber and Sawmill Workers Union, Local 2693 represents and only claims to represent construction labourers of various contractors in the Thunder Bay area. Given the practice in that area, we cannot accept the notion that they represent trades or tradesmen other than construction labourers such as is consistent with the notion and the language of their recognition clause that they represent "all employees". Simply put, by the time of the present applications in 1983, Lumber and Sawmill Workers Union, Local 2693 is a local union that represents construction labourers and only construction labourers.

28. The definition of an affiliated bargaining agent is set out in section 137(1)(a) as follows:

"affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.

The term "affiliated bargaining agent" is a defined term in the Act rather than a term which was one in common use. Functionally, the term was created in order to determine the constituent elements of the scheme of province-wide bargaining. Thus, the definition of "affiliated bargaining agent" operates in the provincial bargaining sections of the Act to determine those constituent elements or trade unions to which the province-wide bargaining sections apply. This can be seen by examining the definition of section 137(1) and then looking at, for instance, section 137(1)(c) which defines "employee bargaining agency":

"employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union.

That is, an employee bargaining agency is made up of affiliated bargaining agents and indeed section 139 which deals with designations reads as follows:

139.-(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;

...

and section 140 subsection (1) reads as follows:

During the period between the one hundred and twentieth and the one hundred and eightieth days prior to the termination of a provincial agreement, an employee bargaining agency, whether designated or not, may apply to the Board to be certified to represent in bargaining a provincial unit of affiliated bargaining agents.

Thus it can be seen that within the province-wide bargaining provisions of the Act the focus of the definition of affiliated bargaining agent is to determine the constituent elements to which those provisions of the Act apply. Conversely, if a trade union is not an affiliated bargaining agent, then the provisions of the Act relating to mandatory province-wide bargaining don't apply to the trade union.

29. The definition of "affiliated bargaining agent" contains two elements. One, it represents employees who commonly bargaining separately and apart from other employees and, two is subordinate or directly related to or is a provincial, national or international trade union. The definition also sets out the test which the Board must use in weighing these factors, that is, "according to established trade union practice in the construction industry".

30. Let us first examine the test involved, the matter of "established trade union practice". Similar language occurs in section 117(f), the definition of trade union as it relates to the construction industry provisions of the Act:

"trade union" means a trade union that according to established trade union practice pertains to the construction industry.

Whether one looks to provincial practice or local practice was argued at length in these proceedings and indeed the matter of establishing practice was discussed in a previous Board decision, *Manacon Construction*, [1983] OLRB Rep. Mar. 407 and *Manacon Construction*, [1983] OLRB Rep. July 1104. In the *Manacon* case the Board adopted the practice of the parent trade union because the local involved in the case was a newly chartered local and could not be said to have established a practice of its own. This test in the affiliated bargaining agent context is similar to the test that the Board has applied in section 117. Thus, for instance, under section 117 of the Act, where the trade union has no practice because it is a new local, the Board will accept the practice of the parent trade union. On the other hand, where a local has established its own practice, the Board will accept that practice. Now, it is interesting to note in the present case that the Board has, as we have noted earlier in this decision, for some 20 odd years accepted the status of Lumber and Sawmill Workers Union, Local 2693 as a construction industry union within the meaning of section 117 of the Act. It is clear to us, therefore, that in determining whether or not the two constituent elements of an affiliated bargaining agent have been met by Local 2693, this panel is entitled to look at the practice established by Local 2693 in the Thunder Bay area. To suggest that the Board must look at the provincial practice would be to add a requirement to section 137(1)(a) which would hamper any local in the construction industry since locals that have a restricted geographic scope will of course only typically have a practice in that limited geographic area. Therefore, in determining whether or not Local 2693 is an affiliated bargaining agency, we will make such a determination on the basis of Local 2693's practice in the construction industry in its area.

31. We will deal with the two elements in the definition of "affiliated bargaining agent" in reverse order. Taking first then the matter of "relatedness", that is, the bargaining agent must be subordinate or directly related to a provincial, national or international trade union. On the facts in the present case there is no doubt whatsoever that Local 2693 is a local of the United Brotherhood of Carpenters and Joiners of America, an international trade union to which the province-wide bargaining sections of the Act apply. Nor can it be said that such a relationship is a mere technicality. The relationship as we have seen from its history between Lumber and Sawmill Workers Union, Local 2693 and the Carpenters Local and their parent union is that of a subordinate and

related trade union. Thus, for example, the incident referred to earlier concerning the transfer of jurisdiction over divers from the Lumber and Sawmill Workers Union, Local 2693 to the Carpenters Local. That was a solely internal union matter for the United Brotherhood of Carpenters. We have no doubt in finding, therefore, that Lumber and Sawmill Workers Union, Local 2693 is subordinate to and directly related to the United Brotherhood of Carpenters and Carpenters Local 1669.

32. The other part of the definition of “affiliated bargaining agent” is contained in the words “represents employees who commonly bargain separately and apart from other employees”. This is language which is also found elsewhere in the *Labour Relations Act*. Section 6(3) of the Act reads as follows:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees *and commonly bargaining separately and apart from other employees* through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining such skills or craft,...

[emphasis added]

This language constitutes one of the three elements which form the test of whether or not a trade union is entitled to a craft bargaining unit under section 6(3) of the Act. The relationship between section 6(3) of the Act and bargaining units in the construction industry is one that has created much confusion over the years.

33. Few, if any, of the construction trades have ever bothered to seek craft bargaining units within the specific meaning of section 6(3) of the Act. Rather, the Board has for many years (since the mid-fifties) simply recognized the “trade” structure of the construction industry (indeed a number of the construction trades would not qualify as craft units under section 6(3) of the Act because of a lack of “exercising technical skills or craft” as required by section 6(3)). Further, it can be observed that construction labourers although accepted as a “trade” could never be a craft bargaining unit. In any event, the Board has for a number of years recognized as appropriate bargaining units relating to construction trades, such as, for example, ironworkers and rodmen. These units have a characteristic similar to a craft unit in that they are distinct from “all employee” by using a generic term to limit the scope of the bargaining unit. Thus, the term “construction labourer” in and of itself excludes employees who are other than construction labourers.

34. It follows from the above comments referring to “commonly bargain separately and apart from other employees” that a trade union that is an industrial union (in the sense that it bargains for all employees of an employer) can never be an affiliated bargaining agent within the meaning of section 137(1)(a) of the Act. Thus, when Lumber and Sawmill Workers Union, Local 2693 was an industrial union in construction, bargaining for all employees, it was not an affiliated bargaining agent. The problem is that regardless of what their collective agreement says and as a consequence of a number of years of representing only construction labourers, it cannot now be said that Lumber and Sawmill Workers Union, Local 2693 in Northwestern Ontario represents employees other than construction labourers. Indeed, when Local 2693 bargains it bargains solely and separately for construction labourers with a group of employers. For example, although it may appear on the face of the bargaining unit that carpenters not represented by Carpenters Local 1669 in the employ of an employer bound by the standard collective agreement with Local 2693 are bound to that agreement, in no case has Local 2693 bargained with that employer for carpenters. Indeed, for any trade group other than construction labourers. In these circumstances, therefore, we are compelled to find that Local 2693 falls within the meaning of “affiliated bargaining agent”

as set out in section 137(1)(a) of the Act. In sum, according to its established practice in its area it bargains solely and separately for construction labourers apart from any other employees and it is related to the United Brotherhood of Carpenters and Joiners of America and Carpenters Local 1669.

35. We have noted earlier that the function of the definition of “affiliated bargaining agent” in the province-wide bargaining sections of the Act is to define the units or the constituent elements which are affected or covered by the mandatory provincial bargaining provisions of the Act. Thus, in large measure once one determines whether a local union or a trade union is an affiliated bargaining agent this determines whether or not the provincial bargaining legislation applies. While this may be a practical description of the Act, it is not technically in accord with the operation of the provincial bargaining provisions of the Act, and it is indeed this mis-statement of the operation of the Act that led to one of the major concerns raised by counsel in the hearing of this matter. Counsel for the employer and for both the interveners and Local 2693 argued that the Board did not have the jurisdiction to make the finding that Local 2693 was or is an affiliated bargaining agent within the meaning of section 137(1)(a) of the Act. The Board did not agree with these representations and took the position that it had the jurisdiction. Simply put, the question was merely a question of fact and law arising before the Board in the case before it. Thus, the Board found that it had the jurisdiction to determine whether or not Local 2693 was an affiliated bargaining agent.

36. Implicit, however, in the argument of counsel in this matter is a more difficult problem which does arise in the present case. It is clear that Local 2693 has not been included in any of the designations made by the Minister of Labour pursuant to section 139 of the Act. It is further clear from a reading of section 139 that this Board has no power to vary or amend any designation made or which might be made by the Minister pursuant to section 139. The specific powers of the Board are set out in subsection 4 of section 139 and they refer solely to questions referred to the Board by the Minister. We take it as the clear law in the present case that it is not within the jurisdiction of this Board to either amend or even suggest amendments to designations made by the Minister under section 139 of the Act. We feel compelled to note, however, that the non-inclusion or non-reference to Local 2693 in any of the designations relating to the United Brotherhood of Carpenters is consistent with our findings in this matter that in 1977-78 Local 2693 appears to have been an industrial union. The problem that arises is that by 1983 regardless of what Local 2693 may have been in the past, the evidence is clear that it was solely a trade union relating to collective bargaining for construction labourers and related to the United Brotherhood of Carpenters.

37. If the Board does not have the jurisdiction to amend any of the designations made by the Minister of Labour but the Board finds that Local 2693 is an affiliated bargaining agent, what then is the jurisdiction of the Board to deal with such an affiliated bargaining agent in the context of this application? It is trite law to say that in any application or series of applications made to this Board the Board has the power to enforce any and all of the provisions of the *Labour Relations Act*. Thus, in the present case we are dealing with section 63 and section 1(4). The Board is entitled nevertheless to look at those sections relating to provincial bargaining to determine whether any of these sections speak to the present situation. The two sections which one frequently refers are section 144 and section 146. Section 144 is a direction to the Board concerning bargaining units in certification cases. Of primary importance, however, is section 146 of the Act which may be viewed as the lynch pin of the provincial bargaining legislation, specifically section 146(1) and (2) read as follows:

(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

Section 146(1) mandates the provincial bargaining system by requiring one collective agreement for each of the provincial units. Subsection (2) protects that structure by prohibiting any alternative arrangement such as may be set up to avoid compliance with the provincial bargaining requirement. In that regard, therefore, it has been the off-stated view of this Board that it will read subsection (2) broadly in order to protect the provincial bargaining system. In the present case, however, the question before this panel of the Board is whether subsection (2) affects Lumber and Sawmill Workers Union, Local 2693. Clearly, for instance, if section 146(2) would render unlawful any collective agreement made by Local 2693 affecting employees in the industrial, commercial and institutional sector of the construction industry then the Board is entitled to take that finding into account in the disposition of the section 63 and section 1(4) application before it.

38. What then is the situation of Local 2693? On the one hand it is not part of an employee bargaining agency. On the other hand we have found that it is an affiliated bargaining agent within the meaning of section 137(1)(a). Any attempt by Local 2693 to bargain contrary to the scope of subsection (2) of section 146 would be unlawful if that section applies to Local 2693. In our view the key words to the section are as emphasized below:

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement *affecting employees represented by affiliated bargaining agents* other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

[emphasis added]

In our view the construction labourers represented by Local 2693 are employees represented by an affiliated bargaining agent and they are not represented under the aegis of the provincial agreement as required by section 146(1) insofar as they relate to the industrial, commercial and institutional sector of the construction industry.

39. It is of key significance in interpreting section 146(2) that the words underlined in the paragraph above do not refer to an "employee bargaining agent". Clearly, if it were only those employees represented by employee bargaining agents then Local 2693 would not be affected by that provision of the Act.

40. This interpretation of section 146(2) has been enunciated by this Board in the past. Thus, in the Board's decision in *Manacon Construction*, [1983] OLRB Rep. Mar. 407 at p. 424-5:

37. While the Board has arrived at this result having found that Local 1030 is represented by the millwrights designated employee bargaining agency and, consequently, is a trade union to which subsections 1 through 4 of section 144 apply and is not a trade union to which subsection 5 applies, the Board is of the view that the result would be no different if Local 1030 had been excluded from representing millwrights and their apprentices in the ICI sector. It would be a trade union that is *not* represented by a designated or certified employee bargaining agency as contemplated by section 144(5), but it would still be an affiliated bargaining agent within the meaning of section 137(1)(a). As an affiliated bargaining agent, it is subject to the strictures of

sections 146 of the Act. Subsection 1 of section 146 allows the making of only one Collective Agreement by an employee bargaining agency and an employer bargaining agency for each unit (of affiliated bargaining agents or employers as the case may be) that it represents and that must be the provincial agreement. Subsection 2 makes it an offence for, *inter alia*, an affiliated bargaining agent (without reference to whether represented by an employee bargaining agency and so affecting all affiliated bargaining agents) or employee bargaining agency to bargain for, to attempt to bargain for or to conclude any collective agreement or any other arrangement affecting employees in the ICI sector represented by affiliated bargaining agents *other than a provincial agreement*. Since a provincial agreement must be between an employee bargaining agency and an employer bargaining agency, an affiliated bargaining agent cannot make a provincial agreement unless it is also an employee bargaining agency. With that one exception, an affiliated bargaining agent cannot make a provincial agreement and it is prohibited from making any other agreement or arrangement with respect to employees in the ICI sector. Therefore an affiliated bargaining agent that is not an employee bargaining agency cannot make a lawful agreement with respect to employees in the ICI sector. By comparison, the Christian Labour Association of Canada and the National Council of Canadian Labour, trade unions which are eligible to apply under subsection 5 of section 144 of the Act, are not affiliated bargaining agents. Thus when they are certified to represent employees in the ICI sector, they are not subject to the strictures of section 146(2) of the Act.

While it may technically be said that the above-quoted paragraph is obiter to the Board's decision in *Manacon Construction* it nevertheless is a clear statement of the Board's view of how section 146(2) operates and we are of the view that it applies in the present case. That is to say, once a union is found to be an affiliated bargaining agent it is bound by the prohibition of section 146(2) with respect to the employees represented by it.

41. What then is the effect of the prohibition of section 146(2)? In our view it means that Local 2693 as an affiliated bargaining agent cannot lawfully represent the construction labourers of the respondent E K T Industries insofar as those construction labourers are employed in the industrial, commercial and institutional sector of the construction industry. On the other hand, no such limitation applies to Labourers Local 607. It is our view that the Board ought not to provide bargaining rights for Local 2693 through either section 63 or section 1(4) of the Act which would lead to collective agreements which would violate the prohibition of section 146(2) of the Act. In our view, therefore, the claim by Lumber and Sawmill Workers Union, Local 2693 for bargaining rights with respect to E K T with respect to employees in the industrial, commercial and institutional sector should be dismissed and the claim by Labourers Local 607 ought to be allowed.

42. As we have noted earlier in this decision, Local 2693 has never represented employees of Ontario Hydro (the Electrical Power Systems Sector) nor in the pipelines sector. The bargaining rights set out in the collective agreement between Local 2693 and the Thunder Bay Construction Association however do not appear to be limited by sector. Insofar as there may be bargaining rights in such other sectors (and we think this primarily means the residential sector) we are of the view that the resolution of these bargaining rights can be made not on the basis of whether or not Local 2693 is an affiliated bargaining agent, but on the evidence in the section 63/1(4) matter. These reasons are separate and distinct from our reasons relating to the industrial, commercial and institutional sector, but may also be used in support of the conclusion which we reached with regard to these bargaining rights.

43. If we examine the claims of the two unions, on the one hand, Lumber and Sawmill Workers Union, Local 2693 has a claim under section 63 of the Act which relates to the sale of assets which were formerly the assets of *Kamtar* to *T-2 Rentals* which in turn allows for the use of such assets by E K T. While we are not prepared to say that such a relationship is not sufficient to form a claim under section 63 of the Act, we are nevertheless constrained to point out that that is a relatively weak link between *Kamtar* and E K T. As we have noted specifically, the business of

Kamtar was not merged into E K T. It was simply this indirect purchase of assets and then Magne and Turchyn became employees of E K T, and indeed, E K T appears to us on its face to be solely a Sinclair operation. At this point, the claim of Labourers Local 607 is that the Sinclair operation "Tamarron Group Inc." was in fact won by a raid from Lumber and Sawmill Workers Union, Local 2693 and that the claim to bargaining rights by Labourers Local 607 is both through section 63 of the Act and through section 1(4) and it is directly through the Sinclair operation.

44. It is our view that in such circumstances the claim by Labourers Local 607 to represent construction labourers is a stronger claim than that of Lumber and Sawmill Workers Union, Local 2693 for these bargaining rights not in the industrial, institutional and commercial sector of the construction industry. As we have noted earlier, this is not a case in which a vote would be an appropriate way of determining such an impasse since both agreements purport to have hiring halls and indeed since the employer has already shown preference by signing a voluntary recognition with Local 2693.

45. For the foregoing reasons, the Board therefore declares that the Labourers Provincial Council and Labourers Local 607 are entitled to represent the construction labourers employed by E K T Industries Inc., and further that these applications insofar as they relate to Lumber and Sawmill Workers Union, Local 2693 are dismissed.

2824-85-U Brian Fry, Complainant v. Teamsters Union Local 419, Respondent

Duty of Fair Representation - Unfair Labour Practice - Part-time and full-time employees paying union dues according to same formula - Part-time employees paying proportionately more of their wages as dues - Whether dues structure "fair" outside scope of fair representation duty - Complaint dismissed

BEFORE: *Patricia Hughes*, Vice-Chair.

APPEARANCES: *Glen Naphtali*, *David Doucette* and *Joshua Prasad* for the complainant; *B. Chercover*, *F. Grimaldi* and *D. Power* for the respondent.

DECISION OF THE BOARD; March 23, 1987

1. The complainant alleges that the respondent union has contravened section 68 of the *Labour Relations Act* ("the Act") by requiring part-time and full-time employees to pay union dues according to the same formula. The result, says the complainant, is that the part-time employees pay proportionately more of their wages as dues than do the full-time employees.

2. Attached to the complaint is a letter delivered, according to the complaint, "by the steward (Doug Powers) to the head of the local union". The letter sets out subsections 72(5) and (6) (providing that all employees in the bargaining unit are entitled to participate in strike or ratification votes) and adds:

In the past, no attempt has been made to extend these privileges to part-time employees. The union could demonstrate good faith in its' [sic] relations with it's [sic] members by;

- (1) allowing all members to vote on union decisions including strike votes; ratification of contracts and election of union officials.

and

- (2) revising the payment of union dues to reflect the employees [sic] income.

There is no allegation in the complaint itself that the union has prevented the part-time employees from participating in any strike or ratification vote held by the union, nor was this issue raised by the complainant's representative in his clear and concise oral submissions before me. Counsel for the union stated that the position of the union is that all employees, including part-time employees, have the right to participate in strike and ratification votes. The respondent's reply states:

The respondent acknowledges Sections 72(5) & (6) of the Labour Relations Act and undertakes to comply with same.

3. Thus the only matter actually before me is the fairness of the dues structure established by the union's constitution. There are no allegations that the union has failed to represent these employees in their relations with their employer in accordance with the requirements of section 68 of the Act.

4. The complainant's representative informed the Board that the part-time workers had attempted to have the dues structure changed and, having failed to convince the union officials and/or other members of the union and bargaining unit to make changes, had come to the Board in the hope it could help them. The Board has stated on many occasions that its jurisdiction under either section 68 or 69 does not extend to monitoring the union's internal processes: *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; *Ontario Hydro*, [1980] OLRB Rep. July 1039; *L. M. L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252. There are some "exceptions" to this general principle, however. The Board has indicated that it may be prepared to entertain allegations with respect to the union's internal practices where intimidation or coercion is involved (see *Frank Manoni*, [1981] OLRB Rep. Dec. 1775), but there are no such allegations here. Similarly, an allegation of manipulation of the union's own practices for the purpose of restricting access of part-time workers to the bargaining process (see *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781) or of misrepresentation by the union of its dealings with the employer with respect to part-time workers (see *Gerald Lecuyer*, [1985] OLRB Rep. July 1099) may require rebuttal by the union, but such conduct is not at issue here.

5. The union's dues structure by itself is a matter internal to the union. Accordingly, whether the structure is a "fair" one with respect to any particular group of employees is a question outside the scope of section 68 of the Act.

6. Accordingly, I ruled orally that this complaint does not establish a *prima facie* case under section 68 of the Act and is therefore dismissed.

1851-86-R International Brotherhood of Painters and Allied Trades, Local 1590, Applicant v. Jette Pedersen, carrying on business under the firm name and style of **Gallant Painting**, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Employer - Membership Evidence - Practice and Procedure - Applicant refused leave to adduce evidence with respect to payment of a dollar on card which only contained signature on receipt portion - Portion of respondent's reply alleging unparticularized improprieties struck - Failure to retain legal counsel no excuse for ignorance of Board's rules - Respondent engaged in painting structures at petrochemical complexes - Painting susceptible of being categorized as either maintenance work or construction work - Painting done for purpose of sustaining existing operations classified as maintenance work - Application for certification not properly made pursuant to construction industry provisions of Act

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. W. Murray* and *C. A. Ballentine*.

APPEARANCES: *A. M. Minsky* and *R. Last* for the applicant; *Mark B. Coulston*, *John D. Gallant* and *Jette Pedersen* for the respondent; *Remi Laviolette* for the objectors.

DECISION OF THE BOARD; March 4, 1987

1. This application for certification has been made pursuant to the construction industry provisions of the *Labour Relations Act*.
2. The applicant seeks to represent a bargaining unit of painters and painters' apprentices, save and except non-working formen and those above that rank, employed by the respondent in the industrial, commercial and institutional ("ICI") sector of the construction industry throughout Ontario and all such employees of the respondent in all other sectors of the construction industry in the County of Lambton (Board Area #2). In its reply, the respondent claims that all painters and painters' apprentices save and except non-working foremen and those above that rank employed by it in the ICI sector in the County of Lambton is the unit of its employees appropriate for collective bargaining. However, the respondent also denies that it is an employer in the construction industry.
3. The respondent filed a reply, a list of employees containing 24 names on Schedule A, 3 names on Schedule C, and 1 name on Schedule D, together with specimen signatures for all persons on those lists as required by the Board's Rules of Procedure.
4. The applicant filed 13 combination applications for membership and receipts. Twelve of these combination applications for membership contain original signatures of employees of the respondent, and the receipts are countersigned by a witness (the collector) and indicate that a payment of \$1.00 has been made with respect to membership within the six month period immediately preceding the terminal date established for this application. The cards and money were collected by one person and the applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents Construction Industry attesting to the sufficiency and regularity of its membership evidence.
5. The remaining card is deficient in that it does not disclose any payment in respect of membership by the individual applying for membership in the applicant. Counsel for the applicant argued that the persons signature on the receipt portion of the card indicates that some payment was made and that it would be unduly technical to not permit the applicant to adduce evidence

with respect to the amount of that payment. Pursuant to the provisions of the *Labour Relations Act*, the certification of trade unions in this Province is based primarily upon an assessment of the union's membership support as evidenced by membership records filed in support of an application for certification. Because it is a form of hearsay evidence that the Act directs (in subsection 111(1)) not be disclosed to the employer and which is not subject to cross-examination, the Board holds trade unions to be a high standard of precision and integrity in the quality of the membership evidence submitted. Subsection 1(1)(l) of the Act sets out two essential substantive conditions of membership in a trade union. It defines "member" of a trade union as including a person who has both applied for membership *and* has paid on his own behalf at least \$1.00 in respect of initiation fees or dues. "Membership" is given a corresponding meaning. Subsection 73(2) of the Board's Rules of Procedure stipulates that no oral evidence of membership in a trade union shall be accepted by the Board except to identify and substantiate the documentary evidence filed. The Board requires that a payment of at least \$1.00 be made and shown in writing on the union's documentary evidence of membership, and while the Board will accept oral evidence as to the date when the membership evidence was obtained, or by whom it was collected, the Board will not permit a trade union to establish either of the two substantive conditions of membership required by the Act through oral evidence. (See *P.R.C. Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. May 749). In the result we refused the applicant leave to adduce evidence with respect to payment and rejected the card as evidence of membership in the union.

6. Paragraph 14 of Schedule "A" to the respondent's reply reads as follows:

14. The Respondent claims that the Applicant has not conducted itself in accordance with the general rules and procedures governing the organization of a bargaining unit of a trade union.

By letter dated November 21, 1986, counsel for the applicant demanded particulars of that allegation. Prior to the first day of hearing into this application on November 27, 1986, some information was provided by the respondent, but the applicant maintained that the allegation was still insufficiently particularized to permit it to properly prepare to respond to it. Counsel for the respondent candidly admitted that he had no more particulars to provide, but submitted that the employer could not be expected to have them and that, in any event, the request for particulars had come too late. Mr. Laviolette, on behalf of the group of objecting employees, supported the respondent's position. In the alternative he argued, with support from the company, that he should now be permitted to make and particularize that allegation himself. He stated he was not a lawyer and didn't think that this was a court proceeding. He suggested that the Board should therefore allow him more leeway in presenting his case.

7. Section 72 of the Board's Rules of Procedure provides as follows:

72.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these rules of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

In addition Section 8 of the Statutory Powers Procedure Act provides that:

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

It was evident from the submissions of counsel for the respondent that the impugned pleading relates to complaints made by one or more employees to the respondent. If the respondent was sufficiently concerned that it wanted to bring the matter before the Board, there is no reason why it could not have investigated the matter, within the constraints of the Act, and provided particulars. The objecting employees filed nothing other than a statement of desire purporting to be a voluntary expression of the wishes of the person signing it to not be represented by the applicant. No written intervention or allegations of impropriety were made by them. Further, the objecting employees chose not to retain counsel with respect to this application. Nor, according to Mr. Laviolette, was there any effort made by them to ascertain, either from the Board or otherwise, what would be required of them with respect to any allegations of impropriety that they wished to bring before the Board. We note that they had almost two months to do so and knew enough to be able to deliver their statement of desire in a timely manner.

8. There is no doubt that the applicant has not had sufficient notice of the improprieties that it is alleged to have committed. Section 72 of the Board's Rules of Procedure has a two-fold purpose and is based on both legal and industrial relations considerations. The legal consideration (which is also present in section 8 of the *Statutory Powers Procedure Act*) is a recognition of the rule of natural justice that anyone charged with wrongdoing should have reasonable notice of the charge made against him. The labour relations consideration is a recognition of the prejudicial effect of delay on a trade union's application for certification. Section 72 seeks to balance natural justice and the avoidance of delay in proceedings before the Board. In an application for certification it is essential that allegations of wrongdoing be made in a timely manner and with sufficient particularity so that an applicant trade union is not prejudiced either by surprise or by being forced to seek an adjournment, thereby delaying its own application (see *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141). Persons involved in proceedings before the Board have a right to appear before it with or without counsel. The Board recognizes the difficulties that persons who choose to appear without counsel may encounter and normally affords such persons a somewhat greater latitude in the manner in which they conduct their cases. However, though proceedings before the Board are less formal than those in a court of law, they are nevertheless legal proceedings which are governed by the Board's Rules and Procedures and by the rules of fairness and natural justice.

Those who choose to participate in proceedings before the Board without obtaining counsel or other assistance do so at their peril. The law and the rules applicable to proceedings before the Board apply equally to all parties, whether or not they choose to retain counsel. Choosing to neither retain counsel nor otherwise inform oneself does not relieve a party of the obligation to conduct itself in accordance with the rules. Ignorance of the law excuses no one from his obligations under it. We therefore ruled that paragraph 14 of Schedule "A" to the respondent's reply would be struck from it and that we would not conduct any inquiry or admit any evidence relating to allegations of impropriety by the applicant.

9. There was one further preliminary matter. Pleading "inadvertence", the respondent sought to amend its reply by having the words "and decorating" deleted wherever those appear in the document as filed. Counsel for the applicant objected on the basis that the amendment was being sought late (some 1 1/2 months after filing) and only after he had advised counsel for the respondent that the applicant intended to rely on that pleading as an admission against interest relating to the threshold issue of "construction employer" raised in the reply. After hearing argument from all parties, the Board ruled that it would allow the amendment, notwithstanding when it was sought, but without prejudice to the applicant relying upon the original pleading and argument (to the extent that doing so would assist the trade union).

10. The Board then heard the evidence and representations of the applicant and the respondent with respect to the threshold issue raised by the respondent; that is, whether this application for certification is properly made pursuant to the construction industry provisions of the Act. Though given notice, the group of employee objectors did not attend or participate in the hearing with respect to this issue.

11. The evidence reveals that, at the time the application was made, the respondent was engaged in painting various platforms, railway cars, buildings, pipes, tanks and other containers, and other structures at the petrochemical complexes operated by Petrosar Limited and Dupont Canada Inc. in Corunna, near Sarnia. Though some of the painting was within or of enclosed structures, the bulk of it was of exterior structures. All of the painting done by the respondent was of existing operating structures that had been painted before. Further, this painting was part of the ongoing plant "maintenance" programs of Petrosar and Dupont. The purpose of the painting was and is to apply a coating that will preserve and protect the structures from corrosion and thereby extend their useful lives. Colours, though selected by Petrosar and Dupont respectively, are dictated by the concern for protection and by legislation. We find that, contrary to the suggestion of the applicant, aesthetics plays little or no role in the painting and only becomes a consideration, if at all, after the primary goal of protection is achieved and the dictates of the legislation are satisfied. We are also satisfied that there is a difference between the techniques and materials used in the relevant painting done by the respondent and the techniques and materials used in new construction painting.

12. Subsection 117(c) of the Act defines an "employer" in the construction industry as follows:

117. (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

To be an employer in the construction industry, one must do work in the "construction industry" which is defined, in subsection 1(1)(f):

- (f) "construction industry" means the business that are engaged in constructing, altering,

decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

13. Though the words “maintenance” and “maintaining” do not appear in the Act, the distinction between maintenance work and construction work has long been recognized by the Board (see for example, *Tops Marina Motor Hotel*, 64 CLLC ¶16,004; *Dravo of Canada Ltd.*, [1967] OLRB Rep. June 261; *Quinard Limited*, [1982] OLRB Rep. July 1054). Unfortunately, there is no sharp line that separates construction work on one hand from maintenance work on the other, and what is referred to as “maintenance” work in the broad sense or for internal corporate purposes is not necessarily maintenance work for labour relations purposes. In argument, both the applicant and the respondent relied on the Board’s decision in *The Master Insulators’ Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477. In addition, counsel for the applicant submitted that the painting done by the respondent at the Petrosar and Dupont facilities was (and is) “decorating” within the meaning of that word as used in section 1(1)(f) of the Act. He argued that the Act uses “decorating” in an industrial or generic sense rather than in any purely aesthetic sense.

14. In *Master Insulators’*, (supra at paras. 28 and 29), the Board explained the distinction between construction work and maintenance work as follows:

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was in an addition for the safety and comfort of Stelco’s employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. *The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint “maintenance” is difficult to distinguish from “repair”. In our view, *it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work.* Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. “Maintenance” and “repair” are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

Though it was asserted in this proceeding that the respondent was (and is) engaged in “decorating” (rather than “repairing”), we find this reasoning equally applicable to the issue in this proceeding and we adopt the same. Further, the words used by the legislature must be interpreted within the context in which they are used. However, insofar as it is possible within that context, the words must be given their plain and ordinary meaning. The Legislature chose to use the word “decorating” as opposed to “painting” or some other word. The verb “decorate” is defined by the Concise

Oxford Dictionary (6th ed) as meaning to "furnish with adornments". According to that same dictionary, to "adorn" is to "add beauty or lustre to" something; in other words, to improve its appearance. Accepting the submission of the applicant would give an unnatural meaning to the word "decorating" and create a situation where virtually no painting would be maintenance work. On the other hand, the respondent's position, which we accept as correct, uses "decorating" in its plain and ordinary sense and leads to an acceptable labour relations result; that is, painting can be either maintenance work or construction work, depending on the circumstances.

15. In the result, we find that, insofar as the painting done by the respondent was and is of existing structures done for the primary purpose of sustaining and protecting operating systems, it must be classified as maintenance work. Consequently, this application for certification was not properly made pursuant to the construction industry provisions of the Act.

16. This proceeding will continue on March 17 and 18, 1987 as previously scheduled. The purpose of the hearing will be to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to this application and, without limiting the generality of the foregoing, specifically with respect to:

- (a) the further processing of this application;
- (b) the bargaining unit description;
- (c) the list of employees filed by the respondent and the challenges thereto by the applicant;
- (d) the statement of desire, filed in opposition to the application;
- (e) the applicant's request that it be certified pursuant to the provisions of section 8 of the Act.

1851-86-R International Brotherhood of Painters and Allied Trades, Local 1590, Applicant v. Jette Pedersen, carrying on business under the firm name and style of Gallant Painting, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Practice and Procedure - Application for certification brought under construction industry provisions - Construction industry provisions subsequently found to not be applicable - Employer alleging that procedural fairness required that application be dismissed - Board following its practice of treating the application as though it had been made under the general provisions

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. W. Murray* and *C. A. Ballentine*.

APPEARANCES: *B. Fishbein* and *R. Last* for the applicant; *Mark B. Coulston*, *John D. Gallant* and *Jette Pedersen* for the respondent; *Remi Laviolette* for the objectors.

DECISION OF THE BOARD; March 24, 1987

1. The hearing of this application for certification continued in Sarnia on March 17, 1987. The respondent, supported by Mr. Laviolette on behalf of the objecting employees, opposed the applicant's request that the application be processed in accordance with the general provisions (sections 5, 6 and 7) of the *Labour Relations Act* relating to the certification of trade unions on the basis that procedural fairness required that the application be dismissed.

2. The Board rejected the respondent's position. The applicant had made this application under the construction industry provisions of the Act. In its reply, the respondent pleaded that it is not an employer within the meaning of clause (c) of section 117 of the Act and that the application was therefore not properly brought under the construction industry provisions of the Act. As early as November 27, 1986, the first day of hearing into the matter, the applicant requested that the Board treat the application as one made under the general provisions of the Act if the Board concluded that the respondent was correct in that assertion. After hearing the evidence and representations of the parties with respect to the nature of the work performed, during the material times, by the persons for whom the applicant seeks bargaining rights, the Board found, in a decision dated March 4, 1987 [now reported at [1987] OLRB Rep. March 367], that that work is properly classified as maintenance work and that the application was therefore not properly made under the construction industry provisions of the Act. It was not until the hearing continued on March 17, 1987, that either the respondent or the objecting employees gave any indication that they were opposed to the Board treating the application as having been made under the general provisions. Other than baldly asserting that to proceed under the general provisions was unfair, neither the respondent, nor the objecting employees, were able to identify any unfairness or prejudice that would or could result to anyone if the Board did proceed as requested by the applicant. We were satisfied both that there was no unfairness or prejudice, and that there was no labour relations reason for not proceeding in that manner. Further, in circumstances where an application for certification has been brought under the construction industry provisions and those provisions have subsequently been found to not be applicable, it has been the Board's practice to treat the application as though it had been made under the general provisions (see, for example, *J.A. Wilson Display Ltd.*, [1983] OLRB Rep. July 1080; *Township of Loughborough*, [1975] OLRB Rep. Feb. 122). Having regard to the circumstances of this case and the Board's practice, we ruled that the Board would now treat the application as having been made under the general provisions of the Act.

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[Remainder of decision omitted: Editor]

2497-86-R United Steelworkers of America, Applicant v. Haley Industries Limited, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Parties agreeing on bargaining unit description that differed from the standard "office, clerical and technical" description - Board reviewing its role in determining the appropriate bargaining unit when the parties have agreed to a bargaining unit description which departs from the Board's usual practice - Board accepting proposed unit

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *L. A. Richmond* and *R. James* for the applicant; *R. M. Parry* and *Jack Whitehorne* for the respondent; *Larry Todd* and *R. Joe* for the objectors.

DECISION OF THE BOARD; February 24, 1987

1. This is an application for certification in which the applicant and the respondent agreed to the following bargaining unit description:

All office and clerical employees of the respondent in the County of Renfrew, save and except supervisors, persons above the rank of supervisor, and engineering and technical employees.

2. Since this description departs from the Board's usual "office, clerical and technical" description, a differently constituted panel of this Board directed that a hearing be scheduled at which the parties could address the Board with respect to the appropriateness of the proposed unit.

3. A hearing for that purpose was scheduled for February 20, 1987. At that time the applicant and the respondent provided this panel with an agreed statement of facts and accompanying documents.

4. Counsel for the applicant argued that the Board should accept the proposed unit for three reasons: the technical employees were intended to be included in the production unit for which the applicant was certified as the exclusive bargaining agent on September 28, 1951, although the technical employees have not been represented by the applicant at any time since that date; the parties have agreed to the proposed unit and the Board should accept that agreement and, indeed, should not require the parties to justify it; and the proposed unit is an appropriate unit given the nature of the respondent's business and the work performed by the technicians who, counsel argues, have greater community of interest with the production employees than the office and clerical employees.

5. Counsel for the respondent candidly admitted that he found himself in a difficult position: the respondent had agreed to the proposed unit in order to expedite matters and now was required to defend that unit at the request of the Board. He disagreed that the technical employees had been encompassed by the 1951 certificate. He also submitted that the technical employees had a greater community of interest with the office and clerical employees than with the production employees. The respondent was, nevertheless, willing to abide by the agreement.

6. Counsel for the objecting employees pointed out that those employees had not agreed to the proposed bargaining unit description. He was of the view that the applicant had shown no reason to override the usual "office, clerical and technical" description but made no further submissions on this point.

7. We wish to emphasise, as did the first panel hearing this matter, that the Board has the obligation under subsection 6(1) of the *Labour Relations Act* ("the Act") to determine the unit of employees appropriate for collective bargaining. *That obligation remains regardless of any agreement by the parties.* The parties are, of course, free to enter into a voluntary recognition agreement without the Board's approval of any bargaining unit of employees thus represented by the union in their relations with the employer. Once the union seeks certification under the Act, however, it becomes subject to the requirements and processes of the Board as established by the Act and the Regulations thereunder. The Board encourages agreement between and among parties and settlement of matters in dispute where appropriate. But the Board will not accord to an agreement of the parties merely because they have agreed. Rather, it always remains to the Board to determine whether such an agreement conforms to its requirements, policies and practices, and whether any departure is justified. The acceptance or non-acceptance of an agreed-upon bargain-

ing unit description which departs from the Board's usual practice can be determined only on the facts of each case.

8. In the instant case, we are satisfied that the office and clerical employees constitute an appropriate unit and that there was no evidence that fragmentation would cause undue difficulties. We orally ruled that we would accept the proposed bargaining unit in the circumstances of this case. In considering the two policies, one favouring agreement and one favouring a particular bargaining unit configuration, we are of the view that the proposed unit does not offend the latter to the extent that we are prepared to reject the agreement between the applicant and the respondent.

9. We emphasise that our acceptance of the proposed unit does not mean that we conclude that the technical employees are encompassed by the September 28, 1951 certificate.

10. The parties are in disagreement about the inclusion in or exclusion from the bargaining unit of certain individuals. The applicant challenges the inclusion of the following individuals under paragraph 1(3)(b) of the Act: Mary Purcell (personnel and payroll clerk) and Bonnie Shean (plant nurse). It also challenges the inclusion of Valerie Beimers (computer supervisor) on the basis that she exercises managerial and confidential functions. The applicant further takes the position that Sandy Campbell (expeditor) should be included in the unit. The respondent contends that Jimmie Church (janitor) should be included in the unit. The Board hereby appoints a Labour Relations Officer to inquire into and report back to the Board on the duties and responsibilities of the above-named individuals.

11. This matter is referred to the Registrar.

0903-86-R Bernard John Moore, of the City of St. Thomas, an employee of "Imperial Clevite Canada Inc.", Applicant v. International Association of Machinists & Aerospace Workers, Local Lodge 1975, Respondent v. Imperial Clevite Canada Inc., Intervener v. Group of Employees, Objectors

Petition - Termination - First termination application withdrawn - Inquiry into voluntariness of second petition must include consideration of circumstances surrounding first petition - Originator of petition stepping beyond bounds of permissible salesmanship - Employees perceiving originator as linked with management - Application dismissed

BEFORE: *Robert J. Herman*, Vice-Chair, and Board Members *J. Wilson* and *D. A. Patterson*.

APPEARANCES: *D. Richard Mantz* and *Bernard John Moore* for the applicant; *L. A. Richmond*, *J. Nugent*, *M. Powers* and *A. Pinlatt* for the respondent; *Robert W. Little*, *Robert J. Atkinson* and *Allen E. Grotke* for the intervener; no one appearing for the objectors.

DECISION OF ROBERT J. HERMAN, VICE-CHAIR AND BOARD MEMBER D. A. PATTERSON; March 6, 1987

1. This is an application under section 57 of the *Labour Relations Act* for a declaration that the respondent trade union no longer represents the employees of Imperial Clevite Canada Inc. in

the bargaining unit for which it is the bargaining agent. The Board is satisfied that this is a timely application.

2. Under section 57(3) of the Act the Board is required to ascertain “the number of employees in the bargaining unit at the time the application was made and whether or not less than forty-five percent of the employees in the bargaining unit have **voluntarily** signified in writing ... that they no longer wish to be represented by the union ...”. In *Ontario Hospital Association* [1980] O.L.R.B. Rep. Dec. 1759, the Board discussed the issue of voluntariness in a termination proceeding:

31. The sole issue before the Board in every case regarding a “petition” is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees’ apparent change of hearts. As the Board commented in *N.J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union’s certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

See also *Northern Telecom Canada Limited*, [1979] OLRB Rep. April 330.

32. Similarly, in the present case, having regard to the simple history of this matter, and the demeanour and evidence of the various sponsors of the petition as to their reasons for embarking on the course of conduct that they did, the Board is satisfied that these individuals acted on the basis of their own initiative and personal choice. The origination of the petition, in other words, is not a matter that troubles the Board in the present case. That, however, is not an end to the matter. While the signatures on the documents before the Board represent in excess of the 45 per cent required under section 49(3) of the Act before the Board can direct the taking of a representation vote, the Board still must ascertain whether the signatures of not just the petition’s sponsors, but of a full 45 per cent of the unit, are a voluntary reflection of those employees’ wishes. It must be remembered that the Board has the benefit of the direct evidence of only the sponsors of the petition who appear to testify; the remainder of the employees’ wishes can be ascertained only through the evidence that they signed the petition, together with the inferences that the Board is able to draw from the circumstances under which they signed. As far as these other employees are concerned, their action in signing the petition presented to them represents no more than what the Board has described as their “ostensible” wishes, and the Board still has upon it the statutory obligation to ascertain from all of the surrounding evidence whether their actions in signing can be taken to have been voluntary. While background factors may, once again, be properly taken into account in weighing this issue of voluntariness, particularly where the evidence on circulation is at all equivocal, the Board is not entitled to simply assume from this alone that any employees who have signed have done so voluntarily. To do so would render meaningless the insertion of the word “voluntarily” in the subsection, together with the inquiry which the Board has always considered necessary to undertake in these cases. To this extent, the actual issue before the Board and the exercise which it must perform are

essentially the same as those before the Board in a certification proceeding, and cases like *J.A.K. Electrical Contractors Limited*, [1977] OLRB Rep. May 275, must be read as saying no more than that; they are not inconsistent with the practical differences between the two alluded to in, for example, *N.J. Spivak, supra*. As the *J.A.K. Electrical* case says, at paragraph 5:

...As one deduces from reading the *Remington Rand Limited* case the Board applies the same standards to the evidence supporting an application for termination as it applies to petitions in opposition to a trade union that arise during the certification procedures. This position is outlined in *Riel and Int. Bro. of Teamsters Local 230* (known as the *Harry Haley & Sons* case) 58 CLLC ¶18,106 where the Board described its approach in the following way:

“The Board has consistently held that like principles should be applied to the documents filed in support of applications by employees for termination of bargaining rights. In other words the Board has taken the position that even though a majority of the employees in the bargaining unit have signed a document purporting to be an expression of their wishes that they no longer wish to be represented by a trade union, there may be circumstances surrounding the origination or circulation of the document or documents in question which do not make it incumbent on the Board to direct a representation vote.”

In fact the use of the word “voluntary” in section 49(3) seems to be a specific legislative direction to the Board to inquire into the history of *ostensible* wishes of those employees subscribing to an application for termination; (see *P. Chapman Cartage Ltd.* [1972] OLRB Jan. 356.). [emphasis added]

The Board’s function, therefore, is still to “protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent” (cf. *Peel Block Co. Ltd.*, 63 CLLC ¶16,227).

33. The Board, therefore, must go on to consider the evidence of the manner in which this petition was circulated by its sponsors, and whether, based on that evidence, the Board has some reasonable assurance that the other employees who signed did voluntarily. In doing so, the Board must not lose sight, as indicated before, of the history of the present bargaining relationship, and the time at which this application has arisen. Nor is the Board prepared to conclude, as stated before, that the natural polarization and struggle for employee support which is characteristic of an economic confrontation renders it impossible for the employees to express their own wishes in a termination application. Indeed, the legislation, and in particular section 53(3) of the Act, contemplates just the opposite (see again the *Ottawa Journal* case, [1978] OLRB Rep. March 291 at paragraph 8), and ensures that the employees do *not* become “the forgotten people”. Where the polarization is so intense, however, the Board must still be concerned that the signatures in support of a termination application be gathered in circumstances which permit the employees to feel with some comfort that management will not be made aware of which employees in the unit supported the efforts of the petitioners, and which of the employees did not. As in certification cases, the Board becomes concerned when “[t]he evidence taken as a whole...supports the inference that the employees of the...company would logically have assumed that management supported the petition, albeit in a tacit manner, and that the names of those refusing to sign the petition would become known to management” (*Morgan Adhesives*, [1975] OLRB Rep. Nov. 813, at paragraph 31). The question, in other words, is whether management would appear to the employees to be “co-sponsoring” the petition. As discussed, the Board is less inclined to draw this negative inference on a termination application than in a certification proceeding, with its “sudden change of heart”, but the issue of voluntariness never disappears. No one would argue, to put the case in the extreme, that management could conduct its own opinion poll and file it in support of an employee’s termination application. The issue which the Board in each case must grapple with is whether circumstances were such that employees would have had the feeling that that in effect was what was being done.

3. With these observations in mind, we turn to the evidence. The instant application was filed on June 6, 1986, and the signatures on the petition in support thereof were all obtained on

either June 4th or June 5th. This petition was the second attempt by the applicant to terminate the bargaining rights of the union. The Board, differently constituted, convened a hearing into the voluntariness of the first petition on May 27, 1986. After spending most of that day hearing the evidence of the applicant with respect to the first petition, and after adjourning to set further dates for the continuation of that inquiry, the applicant Moore withdrew the first petition and application. Moore testified the first application was withdrawn because the petitioners were unrepresented and as the hearing progressed they felt unprepared and felt it advisable to withdraw, obtain legal assistance, and attempt to file a second application.

4. Our inquiry into the voluntariness of the petition before us must include consideration of the circumstances surrounding the first petition. No party suggested that it was inappropriate for the Board to so inquire into those circumstances. In similar circumstances in *Sam Sniderman Radio Sales and Services Ltd.*, (unreported, Board File No. 0867-86-R, December 3, 1986) the Board, differently constituted, remarked as follows:

"The first question to address with regard to the petition is whether the first and second petitions ought to be considered interrelated. In our view they must. The second petition was created on the very day the application founded by the first petition was defeated at the Labour Board. Mr. Schmitt realized that because of the time limits under the Act, he only had two days to try again to terminate the Union's bargaining rights. By his own admission, his gathering of signatures on the second petition was rendered quite easy because of the ground work which had been laid on the first petition. Employees who had signed the first petition were more than willing to sign the second petition. Indeed, within a few hours, employees throughout the store knew what was going on and approached Mr. Schmitt to renew their efforts to bring the termination application by signing the petition. Clearly, the two petitions were related in the minds of the employees as well as the applicant. Thus, we must conclude that the evidence with respect to the origination and circulation of the first petition is essential to the proper assessment of the weight and effect of the second petition: *Tri-Sure Products Ltd.*, [1970] OLRB Pep. June 324."

For similar reasons, the Board considered it appropriate to consider the circumstances surrounding both the first and second petition.

5. The attempt to terminate the bargaining rights of the respondent had its genesis approximately two years ago, as the respondent union was about to sign a collective agreement changing the benefits package for employees. At that time, in 1984, the applicant Moore convened an emergency meeting of fellow employees opposed to the change in benefits, to see if they could defer the signing of the collective agreement, but he was unsuccessful in his endeavour. Nevertheless, he remained committed to nullifying the benefits provisions in the collective agreement and to seeking the ouster of the union.

6. Moore was the prime originator and circulator of the first petition. On June 2nd both Moore and Gardner attended at a lawyer's office, where they were given blank copies of the petition which ultimately was signed and filed in this proceeding. Shortly after that meeting, Moore and Gardner met with the third person who collected signatures, Jeff Lidster, and together the three of them co-ordinated how the signatures ultimately obtained might be solicited. As all three of them indicated during their respective testimony, obtaining signatures in the second petition was very quick and very easy, as most of those signing the second petition had signed the first petition. To obtain the second set of signatures each of the three of them were assigned certain people to approach, and the petition was divided into three parts, so that each of the three could take a petition to have their assigned employees sign. The plan was then to reassemble the petition into its final form for forwarding to the Board.

7. We step back in time for a moment, to events which occurred several months before the first petition was circulated. At that time Moore composed and had typed a five page document

comparing the new benefits under the collective agreement with benefits previously received by employees covered thereunder. As that document noted, Moore felt that the collective agreement was a poor agreement and that it “should now be corrected ... this can be accomplished with *your* support”. In addition to ensuring that each employee in the bargaining unit received a copy of that document, Moore went to each employee’s house to discuss its contents, in an effort to convince each employee that the collective agreement benefits provisions were less attractive for employees. Returning to the time of the first petition, when Moore spoke to people to obtain their signatures on that first petition, he discussed again the contents of the document he had circulated several months before, and which he had at the time discussed with each employee individually. Moore not only discussed the benefits package, but he also told the employees, prior to their signing the petition, that he had it from a “good source, a confidential source which he could not reveal, that if the union was ousted, the prior benefits package would be reinstated.” As Moore himself testified, he was engaged in a type of salesmanship, just as the union had been in obtaining support, and he felt “the more buttered the corn, the sweeter the taste”.

8. Moore did not reveal whether his “good source” was someone in management. The only reasonable inference, and we so find, is that employees would think the source was management, and Moore surely intended they draw that inference in making his statement. If he did not so intend, it is difficult to see why he made the claim, and why he testified that he made it as part of selling his package. Clearly, therefore, those employees whom Moore got to sign the first petition were concerned about the benefits package and those matters dealt with in the circular which Moore had mailed to them, which he had discussed in their homes individually with them, and which he had indicated a good, though confidential source told him would be reinstated when the union was ousted.

9. These conversations with employees, and Moore’s attempts at salesmanship in order to sell the petition, occurred just prior to employees signing the first petition. When employees signed the second petition, there was virtually no discussion of the purpose of the petition or the benefits package. It was apparent that the shortness of time between the signing of the first petition and the second petition facilitated the obtaining of those second signatures and obviated the need for any further discussion. Employees were well aware Moore was circulating a petition in the work place, and were given to understand the second petition was necessary to properly process the petition and application.

10. Each person signed by Moore, at the time they signed either petition, was aware of Moore’s statements about a “good source”. In these circumstances we find that the signatures obtained by Moore do not represent the voluntary expression of the wishes of those employees, and as the discarding of those signatures means that less than forty-five per cent of the employees in the bargaining unit have voluntarily indicated their wish that the union be decertified, this application will be dismissed.

11. Moore was entitled to engage in salesmanship in the collection of signatures on the petition, provided his salesmanship remained within permissible bounds. The freedom of expression that employers or employees may enjoy does not mean any such expression is immunized from its natural repercussions. In the instant case, employees who signed the petition would perceive Moore as holding himself out as having some link or connection with management, and employees would thereby feel pressured into signing the petition. Moore himself implicitly admitted his technique was predicated upon creating the impression that he could somehow increase the likelihood, if not guarantee, that prior benefits would be reinstated. Either he lied to employees about his source, or he really has links with someone able to assess whether old benefits would be returned. Either scenario would mean employees perceived Moore as linked or allied with management, and

the petition was "sold" on the basis of that perception. Employees would also likely think management had a direct interest in the decertification of the union, and was prepared to support that interest with the promise of reinstatement of certain benefits. In these circumstances we find that each person who was signed by Moore, knowing as they did of Moore's statement that he had it from a good source that the old benefits would be reinstated, did not sign voluntarily within the meaning of the Act. See *J. & A. Cartage Limited*, [1980] OLRB Rep. March 327 and *N-J Spivak Limited*, [1976] OLRB Rep. April 158.

12. We would as well dismiss this application on an alternative ground, as we are not satisfied with the evidence of the circumstances involved in the origination and circulation of the petition. Moore was a very unsatisfactory witness. During his evidence, he changed his story several times, once after a recess when he discussed his testimony with his counsel. Even after this discussion, Moore continued to give contradictory evidence about important aspects of the circulation of the petition and the obtaining of signatures. During cross-examination, Moore was initially conveniently forgetful, eventually admitting essential facts previously glossed over. In contravention of our exclusion order and direction to all participants that they not discuss with future witnesses evidence which had been led in the proceeding, Moore discussed with his subsequent witnesses the evidence which he had given, including his evidence on the critical issue of what he said to employees, when they signed the petitions, concerning the benefits and his claims about his "good source". Although we heard the evidence of those subsequent witnesses on that point, the weight we gave to that evidence was accordingly limited. We found the evidence in support of the petition to not be sufficiently credible for the petitioners to have met their onus in convincing the Board of the voluntariness of the petition, and on this alternative ground we would also dismiss the petition.

13. The applicant has failed to establish that not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union, and accordingly this application is dismissed.

DECISION OF BOARD MEMBER J. P. WILSON;

1. I dissent.

2. While I agree with the facts as laid out in the majority decision, I feel that other matters must be taken into consideration.

3. Previous Board cases have shown that it is not fatal to an application for decertification that other applications have been made in the past and for various reasons have failed; for example *Reynolds and UFCW L.U. 725 (Title Stores)* 0366-85-R (unreported), *Pat Steele and Canadian Union of Brewery Flour, Cereal, Soft Drink and Distillery Workers L.U. 304 (Canada Trustco Mortgage Company)* 2870-84-R (unreported).

4. Previous failed applications in my view tend to indicate a continuing unrest in a bargaining unit and that that is what we have in this case.

5. Such a conclusion is borne out by the figures involved in a bargaining unit of 35 people, the first petition had the signatures of 22 people and the second had 18.

6. It is apparent that the circulation of each petition and their subsequent presentation to the Ontario Labour Relations Board were badly handled. It is equally apparent that a high percentage of the employees in the bargaining unit wanted a change.

7. It is not material why the members wanted a change, nor is it entirely clear. Mr. B. F.

Moore, the applicant, pressed his view that the Union had negotiated an unsatisfactory benefits clause in the Union/Company agreement and that that was the key issue. Neither Mr. Lidster or Ms. Gardner endorsed that view. One is left with the impression that there could have been many reasons for the members to want decertification of the Union and that some of them could have stemmed from the original certification of the Union.

8. Be that as it may, Mr. Moore apparently tried to convince the members that the issue of benefits was key and the application(s) should reflect that fact. The union holds, with justification, the view that Mr. Moore "oversold" his benefits arguments to the members thus swinging them to his view that the Union should be decertified. Also, that he had tacit approval from an unnamed source that the previous benefit package would be restored if the Union was decertified. In making such remarks, to at least one person, Mr. Moore was most unwise.

9. At the hearing, Mr. Moore admitted his "salesmanship" and in his evidence seriously damaged his credibility with conflicts in his testimony. Just as an overly zealous collector in a certification can have the cards he collected put at risk, so too can an applicant for decertification.

10. The difference in this application I feel is that the so called "benefits package" seemed to be prime importance to only Mr. Moore and that others backed his application for diverse reasons but blindly followed Mr. Moore in his benefits package arguments.

11. Mr. Moore in my view followed an unwise path. However, the fact that he was wrong should not rebound to the detriment of the other members of the bargaining unit who may well have signed the petition for other reasons.

12. With two failed applications for decertification and a history of unrest in the bargaining unit it would not be unlikely that a further petition could appear at a later date unless the Union mends its fences.

13. In a case such as this, I feel that it makes good Labour Relations sense to order a vote.

1866-84-M J. M. Schneider Inc., Link Services Inc., Applicant v. The Schneider-Link Office Employees' Association, Respondent

Employee Reference - Office unit relatively new at time of Officer's inquiry - Board detailing its approach to managerial and confidential exclusions - Employer having onus to organize its affairs so that its employees are not occasionally placed in such position of potential conflict of interest if that result can be avoided - Distribution of labour relations functions over a large number of employees may make it hard for Board to conclude that any of the employees should be excluded

BEFORE: *R. O. MacDowell*, Vice-Chair, and Board Members *J. A. Ronson* and *S. O'Flynn*.

APPEARANCES: *Wallace Kenny* for the applicant employer; *Ross Wells* for the respondent trade union.

DECISION OF R. O. MacDOWELL, VICE-CHAIR, AND BOARD MEMBER S. O'FLYNN;
March 2, 1987

I

1. This is an application under section 106(2) of the *Labour Relations Act*. A question has arisen between the parties about the “employment status” of some eleven employees whom the employer asserts fall within the ambit of section 1(3)(b) of the Act. The employer claims that A. Williston, M. Holtz, J. Gross (Peterson), J. Tritschel, J. Fowler, M. Anton, E. Valenta, and J. Lang, both exercise “managerial functions” and are employed in a confidential capacity in matters relating to labour relations. The employer claims that A. Gould, A. Perron, and P. Parker are employed in a confidential capacity in matters relating to labour relations. In each case, the employer contends that these individuals must be excluded from the collective bargaining process. The union replies that a review of their duties and responsibilities should lead to the conclusion that section 1(3)(b) has no application. Section 1(3)(b) reads as follows:

1-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

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(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

2. Section 1(3)(b) has been in the Act in its present form since 1957 when the emphasized words were added in order to clarify the Board’s jurisdiction following the decision of the Supreme Court in *Re Canadian General Electric Company Limited and Ontario Labour Relations Board* [1956] O.W.N. 439, 56 CLLC ¶15,271 (reversed by the Ontario Court of Appeal at [1957] O.W.N. 277, 57 CLLC ¶15,318). If, in the opinion of the Board, the disputed individuals (or any of them) exercise “managerial functions” or are employed in a confidential capacity in matters relating to labour relations, they are not entitled to associate for collective bargaining purposes or engage in collective bargaining under the Act, and they are denied any rights, privileges or benefits prescribed in the collective agreement between the applicant and the respondent.

3. In accordance with the Board’s usual practice in these matters, the Board appointed an Officer to inquire into the duties and responsibilities of the disputed individuals. Pursuant to that appointment, the Board Officer convened a number of meetings of the parties on the premises of the employer. At those meetings both parties were represented by counsel and were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence which, they asserted, might bear upon the issues before the Board. At the completion of this examination the parties were asked if they had any further evidence or witnesses that they wished to call, and each party indicated that it did not. The evidence adduced was transcribed and reproduced, verbatim, in the Officer’s report which was circulated to the parties for comment. Accompanying the report was a notice extending the parties the opportunity to make representations as to the accuracy of the report or the conclusions that, in their submission, the Board should reach in view of its contents. Those representations were received at a Board hearing scheduled for that purpose.

II

4. We do not think that it is necessary to reproduce here the details of the witnesses’ testimony, nor refer to the many cases in which the Board has dealt with the application of section 1(3)(b) of the Act (see generally, J. Sack, Q.C. and C.M. Mitchell, *Ontario Labour Relations Board Law and Practice*, 1985 (Butterworths) at pp. 79-103). It suffices to say that on the first branch of section 1(3)(b), what the Board is trying to assess is the degree and exercise of authority over other employees which would affect their economic position or job security, since the exercise

of such authority, to any significant extent, would be incompatible with participation in the bargaining unit. The Board's approach to this part of section 1(3)(b) was elaborated in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 in a long passage to which we might usefully refer:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 CLRBR at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

3. The *Labour Relations Act* does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they

make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the results in every situation, and in assessing each case, the Board must have due regard to the nature of industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced persons will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the management line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise cer-

tain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to, titles alone are not much assistance in determining what a person's functions really are...

The cases cited above would seem to indicate that while a person may have minor supervisory functions or very limited confidential functions in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b)).

6. It should always be remembered, however, that *The Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent upon any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*, 56 DLR (2d) 193.) Furthermore, (and in addition to the usual rule that 'he who asserts must prove'), a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

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7. We can summarize these general approaches then, as follows:

- (1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.

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- (4) Modern forms of corporate organization, improved means of communica-

tion, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.

- (5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it *is* necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide *concrete examples* of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a "participatory decision-making style". Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

4. The second branch of section 1(3)(b) has a similar collective bargaining purpose: to exclude from a bargaining unit persons whose job involves confidential material relating to labour relations, so that the employer can know that its internal strategies and communications are known and handled exclusively by persons of undivided loyalty (see *Town of Gananoque*, [1981] OLRB Rep. July 1010). Access to information which may be "confidential" in a general sense is not, by itself, sufficient to exclude an employee from the application of the Act. What is important is not the confidentiality of the information, but rather its *labour relations content and potential collective bargaining use*. For example, the secretary to the industrial relations manager may have no independent managerial authority, but may still be privy to the employer's collective bargaining strategy or other sensitive labour relations information. However, as the Board indicated in *York University*, [1975] OLRB Rep. Dec. 945:

...the Board must be satisfied of "a regular, material involvement in matters relating to labour relations" to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case, [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed "confidential" in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case, [1974] OLRB Rep. May 291.) The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See, *The Toledo Scale Division of Reliance Electric Limited* case, [1974] OLRB Rep. June 406).

5. The handling of collective bargaining information must be at the core of the disputed individual's job functions. S/he must be employed in that capacity and for that purpose. An occasional or peripheral involvement is insufficient to justify exclusion from the bargaining unit. As the Board observed twenty years ago in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379:

A person to be excluded under this provision must be employed "in a confidential capacity", i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can readily be seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.

The application of this enunciated "test" to the facts in *Frito-Lay Canada Ltd.*, [1978] OLRB Rep. Sept. 831, prompted this comment from the Board:

While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial relations strategy, and the Board must conclude that these employees are not employed in a confidential capacity in matters relating to labour relations.

6. The decision of the Canada Labour Relations Board in *Transair Ltd.*, 74 CLLC ¶16,111, which was considered by the Supreme Court of Canada in *CLRB v. Transair Limited and Canadian Association of Industrial Mechanical and Allied Workers, Local No. 3*, 76 CLLC ¶14,024, elaborates at some length upon the kind of information which, if disclosed, would be prejudicial to the employer's collective bargaining interests. Although some allowance must be made for the different statutory and business context in which that decision was made, we are satisfied that the CLRB's description provides a useful summary of the kind of collective bargaining information which, *mutatis mutandis*, must be regarded as "sensitive" in the collective bargaining sense contemplated by section 1(3) of our Act. At pages 911-912, the Board sets out a number of relevant considerations:

(b) '...in matters relating to industrial relations' means having access to information relating to such matters as contract negotiations; for example, the persons that sit together to establish, on behalf of management, the range of salary increase that the bargaining team will be mandated to operate within at forthcoming negotiations; or to such matters as the proceedings before a Board like this one: for example, the persons that sit together and plan the strategy which the employer will use as well as the tactics used in the pursuance of its legitimate interest before a Labour Board; or to such matters as the disposition of grievances: for example the persons who plan or who know what compromise will be offered to a grievor.

(c) The access to this information must not be incidental or accidental. It must be part of an employee's regular duties. If the main function of the employee is not related to matters relating to industrial relations, that employee cannot be excluded.

Therein lies a serious matter of judgment and fairness on the part of employers. If management chooses to openly hold discussions in matters related to industrial relations where they could be easily overheard or if management keeps documents of the same nature, in a place where an unauthorized person may inspect them at will, this is no cause for excluding these persons. As an example, if management decides to give keys to files in the personnel department containing data on forthcoming negotiations to all of its clerical employees, this would not make all of them confidential employees in matters relating to industrial relations.

(d) Disclosure of the information to which these persons have access must have an adverse effect on the interests of the employer. The interests of the employer concerned here however, must be interests in industrial relations. In other words, the disclosure of a written reprimand deposited in the personal record of an employee by somebody in a clerical function to union representatives does not have an adverse effect on the interests of said employer where the collective agreement stipulates that concomitant with such deposit in the file, a copy must be forwarded to the employee concerned and/or to the union. On the other hand, disclosure by an employee of information he has access to concerning secret manufacturing process to competitors might well be a breach of confidence and loyalty on the part of that employee but has nothing to do with industrial relations.

(e) On the other hand, one must attach great importance to the absolute necessity for an employer to be capable of operating efficiently and therefore to have the essential number of employees administering industrial relations to assure efficient management in this connection. Employees who are solicited for and accept functions with a company which make them an essential part of that autonomous team which has to administer labour relations, must realize that they will be by the same token deprived from ever aspiring to the acquisition of bargaining rights.

Moreover, a distinction was drawn by the Supreme Court of Canada between matters relating to "industrial relations" and matters relating merely to "personnel information". Spence J. put it this way:

The position of the personnel records clerk, however, requires further examination. A perusal of the reasons for judgment delivered by Chief Justice Jaccett in the Federal Court of Appeal shows that, in my view, his interpretation of the words of s. 118(p)(ii) of the *Canada Labour Code*, R.S.C. 1970, c.L-1, i.e., "a person performs management functions or is employed in a confidential capacity in matters relating to industrial relations", accorded with that of the Canada Labour Relations Board, i.e., that the person so to be excluded was one who had confidential knowledge of the conferences of management in reference to industrial relations. The Chief Justice of the Federal Court of Appeal was of the view that the evidence as to the job description of the personnel records clerk brought her within that class. However, the evidence of Mr. L.J. Sinnott for the respondent shows that, in fact, that part of her duties consisted of attending meetings between labour unions and managerial officers taking minutes of those meetings and distributing them to those who had attended. There could be nothing confidential in that duty as, of course, both management and unions were present at the conferences and the minutes simply stated what had been said and done in the presence of them both. Of course, the duties of this clerk as to personnel records were highly confidential but they were not confidential in reference to industrial relations, only as to personnel relations. Therefore, in my view, there was evidence upon which the Canada Labour Relations Board could properly include the personnel records clerk in the appropriate unit and the appeal, considering it as I do as an appeal of the union, should be allowed to the extent that the inclusion of this clerk within the union was appropriate.

7. The difficulty in the present case is not in stating the appropriate indicia which, if present, would suggest that someone should be excluded from the bargaining unit either on a "managerial" basis, or "confidential/labour relations" basis. The problem here is to unravel the testimony and determine whether the duties of the disputed individuals actually bring them within those parameters. Here we encounter a problem (unfortunately, not unique in this case): at the time of the Officer's inquiry, the collective bargaining relationship with the office unit was still relatively new, so that the employer's organizational structure may still be adapting to the requirements of formal collective bargaining. The "white collar"/office unit was certified in late 1983, a first agreement was concluded in July 1984, and this application was made in October 1984. The plant unit, though, has been in existence for more than sixteen years, so, in that time one would expect at least some evidence of the "mischief" to which section 1(3)(b) is directed. To the extent that the employer's case turns on involvement in the collective bargaining of plant workers, one would expect concrete instances of such involvement - unless the disputed individual had been in his/her

position for only about a short period of time. In addition, in view of the underlying purpose of the Act, an employer has some onus to organize its affairs so that its employees are not *occasionally* placed in such position of potential conflict of interest if that result can be readily avoided. Distributing labour relations functions, piece-meal, over a large number of individuals will not necessarily deprive them of their *prima facie* right to engage in collective bargaining. On the contrary, such dilution of responsibility may make it harder for the Board to find that *any of them* should be excluded. This is not to say that this Board has any right to dictate an employer's managerial structure or business organization; however, where "managerial" or "confidential labour relations" functions are not clearly assigned to, or grouped in, particular positions or persons, it may be difficult for the Board to conclude that the requirements of section 1(3)(b) have been satisfied - bearing in mind that this involves both a qualitative and quantitative assessment, and that, ultimately, the onus rests upon the party seeking exclusion to establish the basis for it.

8. The Board recognizes of course that business organizations and managerial structures can change over time. The employee configuration established on certification is not immutable, and the fact that the disputed persons may have been put in the unit at that time is not necessarily determinative of their status today. Jobs evolve. Functions which attract the concern to which section 1(3)(b) is directed may, in practice, be added to, or deleted from, an employee's regular duties even if there is no formal change in his job description, and this in turn may warrant an application under section 106(2). We merely reiterate that since "managerial" authority or involvement in labour relations are matters of degree, it is only concrete experience which will definitively indicate where the appropriate line should be drawn; and if the alleged "manager" has only three or four subordinates the Board will carefully scrutinize the situation for evidence of independent decision making authority of the kind which establishes the labour relations concerns underlying section 1(3)(b). In the absence of such evidence, the Board may not be inclined to rule in favour of additional exclusions - especially when a new application can be made if the situation changes, and the mischief envisaged by section 1(3)(b) actually materializes.

9. With these reservations, we turn, briefly, to the duties of the disputed individuals.

10. We should note at the outset that, with the exception of the nurses, all of the persons in question are engaged in what might be loosely described as "personnel functions". However, this does not mean that they are automatically prohibited from engaging in collective bargaining (see *London Board of Education* [1968] OLRB Rep. Aug. 447). As the Board noted in such cases as *York University*, *Town of Gananoque*, *Falconbridge Nickel Mines*, and *Frito-lay Canada Ltd.* *supra*, their exclusion depends upon an assessment of their regular job functions, bearing in mind the *prima facie* right to engage in collective bargaining, and the "mischief" which section 1(3)(b) was designed to avoid. It will be convenient to deal with the disputed individuals one by one.

11. Ann Williston - Benefits Clerk

The employer claims that Ms. Williston should be excluded because she *both* exercises managerial functions *and* is employed in a confidential capacity with regard to labour relations matters. The evidence does not support the former proposition. Ms. Williston does not supervise anyone and has neither authority nor occasion to hire, dismiss, or discipline employees, or to recommend or grant wage increases, time off or overtime. She does not have any budgetary or purchasing authority and is not involved in salary review. She prepares no financial reports (aside from benefits costing) and has no significant budgeting role.

12. The core of Ms. Williston's duties involves maintaining benefits records and processing insurance claims. She communicates claims information to the insurer and recommends either payment or further documentation. In this sense only can she be said to "authorize" payment. She has

no real power of decision. She is supervised directly by the employee benefits administrator and the manager of compensation, both of whom are excluded from the bargaining unit. In addition to her regular work, she may receive assignments from them. The actual content of such assignments was not spelled out in the evidence.

13. As Benefits Clerk, Ms. Williston has access to all personnel records including discipline and termination information, and has knowledge of salaries, benefits and pension plan contributions. However, this is not particularly significant from a labour relations point of view, since the company's pension/benefit plans are already known to the union and the employees, who will also be aware of these disciplinary records. None of these items, including knowledge of managerial salaries is particularly significant for labour relations purposes. The information is at best peripheral to the collective bargaining process in which Ms. Williston is not, herself, directly involved.

14. More relevant is what might be described as Ms. Williston's "support role". She has prepared information, based on her records, about absenteeism and insurance claims - in particular where fault or fraud has been alleged. These matters could be the basis of a grievance and she has, in fact, attended grievance meetings to provide information for management. She has offered her opinion to management concerning fraudulent claims and recommended a course of action although she has no effective power of decision in this regard. Still, it would appear that she has been drawn into the management's decision making process because, she said, she would be aware of any disciplinary decisions taken *before* such decisions were communicated to the employee, and she would also be aware of, and assist, any investigation of allegedly fraudulent employee claims. Finally, she indicated that in the last round of bargaining (the only round of bargaining upon which we have direct evidence) she was asked by her supervisor to do certain costings of proposed changes in the benefit package. That exercise was undertaken on a confidential basis because bargaining was ongoing, (although Ms. Williston did not know whether or not the particular proposals considered made it to the bargaining table, and she did not play a direct role in collective bargaining nor was she directly privy to management's negotiating strategy).

15. While the matter is not free from doubt because of the limited time-frame under consideration and the limited number of instances mentioned in Ms. Williston's evidence, we think that we can take administrative notice of the fact that benefit administration is a frequent topic of discussion both at the bargaining table and in the grievance procedure and that Ms. Williston's particular technical role is likely to involve her (as it already has in some instances) in the kind of conflict of interest which section 1(3)(b) was designed to avoid. In our opinion, *on the evidence currently before us*, she is *employed* in a confidential capacity in matters relating to labour relations and should therefore be excluded from the bargaining unit.

16. Julie Gross (Peterson) - Human Resources Assistant

The employer claims that Ms. Gross should be excluded because she both exercises managerial functions and is employed in a confidential capacity with regard to labour relations. Once again, there is little basis for the former proposition. Ms. Gross does not supervise anyone and is not involved in hiring, firing, discipline, promotion, employee evaluation, or the granting of wage increases or time off. She does not correct or inspect the work of other employees and is not involved in the filling of vacancies or the administration of lay-offs or transfers. She is not directly involved in the grievance procedure, grievance meetings, or other labour - management meetings where critical employee interests are at stake. She may type letters to the union concerning disciplinary actions taken, but these are merely clerical or recording functions, and the results are made known to the union.

17. The majority of Ms. Gross' time is devoted to administering the "suggestion" and edu-

cational leave programs. Much of the rest of her time is involved in assisting the manager of training and development to establish performance appraisal forms and training manuals for supervisory trainees, as well as "succession planning for career pathing" for non-managerial personnel. The latter involves expanding the work experience of persons identified as potential supervisors. She does not do performance appraisals herself. Depending on her function, she is supervised directly by the Vice-President of Human Resources or the manager of training and development.

18. Administering the "suggestion program" involves receiving suggestions, assigning an investigator who evaluates and determines the potential savings possible if the suggestion is accepted, and authorizing payment to the suggestor upon a favourable review. However, payment approval requires the authorization of a superior and such payments can only be made within prescribed guidelines. Similarly, educational subsidies are only authorized and paid within pre-established limits. Ms. Gross may make recommendations respecting the employee suggestion program or the educational assistance program, and those recommendations may be accepted, but she has no independent authority in this regard. She has access to certain global budgetary information and personnel records, but this is not, in our view, particularly significant.

19. The function which raises concern from a collective bargaining/1(3)(b) perspective is her role as recording secretary for the negotiations in the past contract year. That role was previously performed by Diane Peters who is excluded from the bargaining unit. Apparently, Ms. Gross took the minutes at the negotiating sessions and, during recesses, remained with the management negotiators who discussed the next round. However, while present, Ms. Gross was not really involved in the decision making process. She was more or less a spectator. There is no clear indication that this will be a continuing role, which, in any event would involve a miniscule portion of her time and could easily be done by excluded persons, as it has been in the past.

20. On balance, we are of the opinion that Ms. Gross is not employed in a confidential capacity in matters relating to labour relations. Those aspects of her job which might arguably trigger section 1(3)(b) concerns are isolated, incidental, and peripheral to her primary responsibilities. In our opinion, she is an "employee" under the Act and should not be excluded from the bargaining unit.

21. Jan Tritschel - Employment Assistant

Ms Tritschel has occupied her present position for approximately ten years. The employer claims that she should be excluded from the bargaining unit because she both exercises managerial functions and is employed in a confidential capacity with regard to labour relations matters. In our opinion the evidence does not support either assertion.

22. Ms. Tritschel has no employees under her direction or control. She has no authority to discipline, suspend or discharge any employee. She attends no management meetings and has no input into the annual budget. She has no significant training role (not that this is necessarily a "managerial function" anyway) other than in respect of her own temporary replacement or to familiarize other employees with the use of the computer. She is not involved in the lay-off or transfer of employees. She has no input into the termination of employees because of poor performance and only a minimal role in the performance appraisal of summer students. She does not do the evaluation herself, but rather forwards the documentation to the students' foremen who return it to the manager of employment who, in turn, retains the final decision whether a student is to stay or be re-hired in the following year. In our view the evidence does not disclose any real influence; and her involvement with this rather transitory group is in itself much less significant than would be the case if, for example, she had some decisive influence with respect to the retention of

permanent employees. Students, we note, are excluded from the bargaining unit and thus do not participate in the collective bargaining process.

23. The actual number of vacancies is decided by the foremen. Ms Tritschel merely telephones prospective workers, beginning with those who were previously employed and giving preference to the sons and daughters of current full-time employees. For the plant, it is mainly a matter of matching the students' height and size to the available jobs. For the office, it is a matter of ascertaining their mechanical/clerical skills. There is little independent judgment and even less to indicate the kind of collective bargaining conflict to which section 1(3)(b) is directed. She has no involvement in the hiring of full-time personnel.

24. Ms. Tritschel does do a considerable amount of "paper work". She runs reports from the computer, updates computer and personnel files, compiles statistics, and does typing for the manager of employment. However, once again, there is little or no direct involvement in, or contact with, sensitive labour relations matters. She has no involvement in the disciplinary process and does not type grievances or appraisal forms. She testified that she is not involved in the typing of agendas for management meetings where personnel policy or strategy matters are discussed nor does she attend any such meetings. She may type offers of employment or termination notices but neither of these documents are confidential. She does have access to certain personnel files because the employer has chosen not to segregate them or keep them under lock and key, but, she said, the employees also have access to their files. Knowledge of or potential access to the salaries of excluded non-managerial personnel is not particularly significant without some affirmative evidence connecting this information to its actual collective bargaining use, and according to Ms. Tritschel, she does not see the details of managerial job changes. She has, on one occasion, typed contract proposals which were subsequently forwarded to the union, but only in a "backup" capacity as one of three individuals whose services were used. She said this was a minor part of her job at best, and was only undertaken because another employee (already excluded from the unit) was unavailable. She has had no other or ongoing role in the collective bargaining, negotiation, or contract administration process.

25. On balance, it is our opinion that Ms. Tritschel does not exercise managerial functions nor is she employed in a confidential capacity in matters respecting labour relations.

26. Josephine Fowler - Senior Payroll Clerk

At the time of the examination, Ms. Fowler was no longer performing the functions of the "senior payroll clerk" however, the parties were agreed that, as the former incumbent in that position, she could accurately describe the job. The employer claims that the senior payroll clerk should be excluded from the bargaining unit both because she exercises managerial functions, and because she is employed in a confidential capacity with respect to labour relations. In our opinion, the evidence does not establish either assertion.

27. Ms. Fowler reported directly to the supervisor of payroll (Al Meyer) and the manager of compensation and benefits (Murray O'Brian). She had responsibility for the office, plant, and management payrolls (with the assistance of four other clerks), but her primary duties involved the management (excluding executive) payroll. She replaced the supervisor of payroll when he was absent but testified that this would only occur once or twice a year, and during that time she would not make any policy decisions, nor did she attend any management meetings.

28. Ms. Fowler's work group included four other payroll clerks, each of whom had different responsibilities with regard to payroll items and the "clearing" of particular accounts. The supervisor might occasionally assign special work to them but, she said, for the most part, there was a

process of self-assignment since the employees knew what they were required to do even in emergency situations. There was an established routine and it was the supervisor who made any decisions requiring an assessment of the employees' particular qualifications. Although Ms. Fowler may have had some minor role co-ordinating the work of others, she was not their "manager" in the sense contemplated by the *Labour Relations Act* since it is apparent that the employees were closely supervised by Mr. Meyer. Indeed, at page 148 of the transcript, one finds this revealing exchange:

Question: And can you explain to me exactly what authorities he (Meyer) told you that you had? Answer: I had to it was part of my job to actually run the payroll without him being there, but he was always there. You're hitting a touchy part with me. I was supposed to do it but I couldn't do it a lot of times because he wouldn't let me. He likes to work with everybody else.
Question: He likes to keep his finger on the pulse?

Answer: Yes.

29. Ms. Fowler has occasionally participated in the on the job training of new employees and, in that context has checked their work, but she has no ongoing responsibility for checking or correcting the work of others. That is a matter undertaken by her supervisor. From time to time her supervisor has asked her how other employees were "getting along" but these informal assessments are not obviously or directly connected to any employment consequences for the individual concerned. Ms. Fowler makes no formal assessment nor was she ever asked whether someone should be kept on or terminated. She has no part in hiring, interviewing prospective employees, disciplining employees or discharging employees, nor was she ever told that she had any disciplinary authority. When she once volunteered the suggestion that someone should be disciplined that recommendation was not followed. She said that *in the absence of her supervisor* she could grant casual time off, but had to immediately advise the manager of compensation and benefits that someone was leaving early. She did not have the authority to sign the time sheets recording overtime and testified that, in any event, employees knew when they had to work overtime and voluntarily did so. There is no indication that she could demand *compulsory* overtime work.

30. Ms. Fowler attended some management meetings which appear to be largely concerned with implementing the new computer system. She had no involvement with the budget, no authority to make purchases, and no "policy making" role. She has never been involved in the grievance procedure or meetings where collective bargaining matters were discussed for either the plant or office bargaining unit.

31. Ms. Fowler clearly had access to payroll information which, to a greater or lesser degree, was also available to other payroll clerks - although she said that the computer security system denied her access to certain kinds of information. She did have access to global hours of work, lost time, unemployment insurance information, premium payments, etc.; and much was made in argument of her knowledge of management salaries and the salaries of non-managerial personnel excluded from the bargaining unit. However, in our opinion, access to this "personnel information" does not mean that Ms. Fowler was employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act. In the first place, much of this information is not "confidential" in any general sense because employees will be well aware of their salary levels, degree of absence, etc. Moreover, it is not obvious to us why knowledge of the salaries of persons excluded from the bargaining unit and therefore, by definition, not involved in the collective bargaining process should lead to the conclusion that someone is employed in a confidential labour relations capacity. There is no obvious connection between the salaries paid to excluded personnel based upon their annual, personal salary review, and the employer's collective bargaining strategy *vis-a-vis* the plant or office bargaining unit, nor does the evidence suggest that there is. This information might be "confidential" from the perspective of the individual concerned or the employer, but, on the evidence, it does not have an established collective bargaining content

with respect to the other payroll information or “breakdowns” with which Ms. Fowler was involved. We note also that much of this information was already available (albeit in disaggregated form) to the union, and to the extent that wage and benefit costs or payroll information enter into the process of collective bargaining at all, there is an evolving Board jurisprudence suggesting that the union is *entitled* to such information in order to facilitate the “rationale discussion” contemplated and required by section 15 of the Act.

32. In the opinion of the Board, Ms. Fowler was not exercising managerial functions nor was she employed in a confidential capacity in matters relating to labour relations. She was an employee under the *Labour Relations Act* and properly included in the bargaining unit.

33. Martha Anton - Employment Assistant

The employer claims that Ms. Anton’s position should be excluded from the bargaining unit because the incumbent both exercises managerial functions and is employed in a confidential capacity with regard to labour relations. Ms. Anton left the company about five months before the examination, however there is no dispute that her evidence accurately describes its duties and responsibilities.

34. Ms. Anton reported directly to the manager of employment. She hired casuals from a list set up by the manager of employment, and, as she describes it, any interviewing she did primarily involved informing the applicant of the type of work involved. Final decisions were made by the manager, but she did make recommendations which were ordinarily accepted. She did no hiring for office bargaining unit positions, or permanent staff in the plant.

35. Ms. Anton has never suspended, disciplined or recommended discipline of any casual worker. She had no authority to grant time off or vacation time to casuals. Upon a foreman’s request for some casuals on a particular shift, she did have the authority to assign casuals to that shift or department, but she did not authorize payment and could not authorize overtime. She supervised no one and had no responsibility for layoff, transfers, full-time hiring or the general budget. Ms. Anton had no role in negotiations, did not represent management in any capacity and was not involved in any grievances. She may have accompanied the manager of employment to a management meeting if the subject of casuals was to be discussed, however her input would be entirely informational.

36. Although Ms. Anton may have had some ancillary role in the casual employees’ entry into their employment relationship with a company the evidence does not establish any ongoing or effective involvement in subsequent labour relations activities. She may have informed casuals that they would be fired and may even have recommended it, but she did not make the final decision nor does the evidence clearly establish that she made the “effective” recommendation as that phrase has been defined in other cases (see *Corporation of the City of Thunder Bay* above). It would appear that the actual decision is made by the casual employee’s direct supervisor based upon his/her assessment of the individual’s performance.

37. Ms Anton had access to all personnel records except those of the personnel department and periodically consulted them to update or terminate files. She sought permission from the manager of employment before giving an employee access to his own files. She handled some typing assignments for the manager of employment, but was unspecific about the types of confidential correspondence involved. She typed general statistical reports for internal management use but, in her testimony, mentioned nothing which was of a sensitive labour relations issue. In particular, she had neither input nor access to negotiating documents.

38. Ms. Anton typed various standard form letters based upon personnel file information, for immigration or credit purposes, upon the request of an employee. Since she had no direct access to management records she had to apply to payroll for the necessary salary information. She also typed standard form letters to employees recording absences where records indicated an absentee problem, but she had no discretion in this. She typed no letters concerning discipline except possibly where a casual employee was concerned. This was not a significant part of her work load and since the letter would go to the casual anyway, it could not be considered confidential. She was occasionally required to "fill in" for other employees in the personnel area who were absent, which extended her range of access to information but not her authority. Like other employees here under consideration, she had access to change advice slips and thus was aware of wage, transfer or termination information.

39. When Ms. Anton's evidence is viewed as a whole, and in light of the Board's approach to the interpretation of section 1(3)(b) set out above, there is exceedingly little evidence of the "mischief" to which section 1(3)(b) is directed or the kinds of authority which would warrant exclusion from the Act. In the opinion of the Board Ms. Anton was not exercising managerial functions nor was she employed in a confidential capacity in matters relating to labour relations.

40. Ann Gould - Payroll Clerk

The employer's position is that Ms. Gould is not covered by the Act because she is employed in a confidential capacity with regard to labour relations matters. The parties are agreed that the evidence adduced by Ms. Gould is representative of herself, as well as A. Perron and P. Parker, who are also payroll clerks. The parties have also agreed that Ms. Gould has access to the management payroll and that P. Parker does not.

41. Ms. Gould has been in her present position for six years and reports to Al Meyer, the supervisor of payroll and Wes Snarr, the assistant supervisor. She described the general nature of her work as: processing pays for the week, balancing, reconciling, producing UIC documentation, and preparing T-4 taxation statements at the end of the year. As her title suggests, she is also directly involved in producing the office payroll, and has access to the payroll information for the plant, sales group, and members of management. From time to time she may help out on the management payroll and may type letters concerning garnishees.

42. Ms. Gould has no involvement whatsoever with the negotiation or administration of the office or plant collective agreements. She has never represented management in labour relations matters and does not attend management meetings. She has no input into the annual budget. She said she has no access to personnel records, maintains no records under lock and key, and has a desk in the general payroll office. She does have some knowledge of the salaries paid to particular individuals including persons excluded from the bargaining unit; but, as we have already noted in other cases, we do not think that mere knowledge of the salaries paid to excluded personnel is particularly significant for collective bargaining purposes. Quite frankly, we do not think that it matters very much that she may know the amount paid to the "cattle buyer" or "poultry buyer", nor do we think (and the evidence and not establish) that such information is closely connected to the employer's collective bargaining strategy. From a labour relations policy point of view (i.e. the mischief which section 1(3)(b) was intended to avoid) we see nothing which would warrant an interpretation which excludes her from the Act.

43. In our opinion Ms. Gould is not employed in a confidential capacity in matters relating to labour relations; and having regard to the agreement of the parties concerning the representative nature of her evidence, we reach the same conclusion with respect to Ms. Perron and Ms. Par-

ker. They may have certain access to “personnel” information regarded as “confidential”, but that is not sufficient to meet the test of section 1(3)(b) (see the discussion above).

44. Elizabeth Valenta - Occupational Health Nurse

The parties are agreed that the evidence adduced concerning Ms. Valenta’s position is representative of the position of Ms. J. Lang as well. The employer claims that both individuals should be excluded from the Act (and therefore the bargaining unit) because they are employed in a confidential capacity with regard to labour relations and, in addition, exercise managerial functions. The parties are agreed that the evidence adduced concerning Ms. Valenta’s position is also representative of the position of Ms. J. Lang.

45. Ms. Valenta reports directly to the acting health and safety supervisor, Ms. June Totzke. Her work group consists of two full-time nurses and one part-time nurse, but it is apparent from the evidence that Ms. Totzke monitors their activities. The evidence is a little unclear about the position of Ms. Lang, and her precise role, but however one views it, the employer’s “managerial argument” rests on the assertion that Ms. Valenta and Ms. Lang exercised managerial functions in respect of a very small number of other employees. Indeed, if the health and safety group is regarded as a separate department there would appear to be as many “managers” as “managed”.

46. The duties of the various nurses are roughly similar. These include assisting the physician in pre-employment medical examinations, and assessing the workers’ condition on return from health related absences. In addition, Ms. Valenta processes worker compensation claims and, she says, evaluates the work of other staff members. However, she said that there is no direct evaluation but only a verbal “how are they doing” assessment expressed to the health and safety supervisor. On the basis of the evidence, we are satisfied that if there is any managerial authority at all exercised in respect of this work group, that authority rests with the health and safety supervisor not Ms. Valenta.

47. Ms. Valenta has no decisive input into hiring and has no discharge or disciplinary authority. She has never had occasion to discipline any employee or issue a written reprimand or suspension period. She has minimal authority to grant casual time off - only if her supervisor is not in the building. She does not sign the employees’ time sheets and did not know whether any inaccuracies might be noted. She was quite uncertain about how her supposed subordinates were paid. She has no role in contract administration or negotiation, and does not represent management in any labour relations matters. In the pre-employment examinations (i.e. before the prospective employee even becomes involved in the labour relations process) the decisive input comes from the company doctor and Ms. Valenta’s superior.

48. Ms. Valenta has no responsibility for teaching or training other employees but may, occasionally, investigate and discuss performance problems, as they arise, with the nurse concerned. She cited, as an example, bandaging techniques or the failure to wear a hard hat where it was required. She has devised an orientation program for other nurses and once even recommended the release of a new nurse whom she found to be unsuitable.

49. Vacations are settled by seniority. Ms. Valenta works an early day shift and the other two nurses rotate shifts every two weeks. Ms. Valenta has custody of the time sheets, but since nurses work different shifts with little over-lap, each nurse is responsible for recording her own time and Ms. Valenta is not responsible for ensuring their accuracy. She clearly does have access to confidential health and compensation records which are kept locked in her private office and, in her professional capacity, she might refuse to permit an employee to return to work without a sat-

isfactory doctor's note, or in the case of infectious diseases the required negative specimen. She has also sent employees home when she assessed them as medically ill or mentally unstable. In this regard, the other nurses have the same responsibility and authority. She has investigated worker compensation claims, views the job site and the work, and discusses the matter with the foreman before deciding on the appropriate position to take. If she and the foreman cannot agree, she refers the matter to her supervisor, and if the company contests the position, she may write a letter to the Workers' Compensation Board outlining the company's objections of the claim. She has not, in practice ever been directly involved in an appeal and indicates in her evidence that, in her absence, either of the full-time nurses could perform the same technical role. She has drafted certain health plan policies to augment government health standards, and these have been submitted to management but, in her opinion, she has no authority to institute such policies without management approval. Yet she admittedly has some authority to exercise her professional judgment in assessing hazards or sending employees home when their continued employment may put them in jeopardy or raise potential difficulties for other employees.

50. In *Ottawa General Hospital* [1984] OLRB Rep. Sept.1199, the Board reviewed, at some length, the problem of determining the employee status of "professionals" who, by reason of their training had a degree of control over other employees. We do not think that it is necessary to repeat that analysis here. It suffices to say that, in our opinion, the functions exercised by Ms. Valenta (and inferentially Ms. Lang) are grounded in their professional responsibilities, rather than their managerial authority, or their alleged employment in a confidential labour relations capacity. They undoubtedly have access to certain information which may, in some sense, be considered "confidential", but we are of the opinion that their duties and responsibilities do not fall within the ambit of section 1(3)(b) of the Act.

51. Mary Anne Holtz - Employment Assistant

The employer claims that Ms. Holtz is not an "employee" under the Act because she both exercises managerial functions and is employed in a confidential capacity with regard to labour relations matters. We have left her position to the last, because the evidence is somewhat ambiguous and incomplete - perhaps because Ms. Holtz has occupied her present position for only eight months. Indeed, there was even some confusion as to how that position should be described. The employer suggested that she occupies the job of *senior* employment assistant, however, Ms. Holtz herself said that she was unaware of the term "senior". She reports to Harold Blake, the manager of employment and, on occasion, to Murray O'Brian, the manager of compensation.

52. Ms. Holtz has a variety of functions including those related to employment, the administration of certain social programs, and miscellaneous duties concerning the ladies' dressing room, the locker rooms and lock assignments. She co-ordinates athletic events, picnics, etc. and plans events for the "golden age club". About half of her time is taken up by employment-related duties, and some of them do (at least arguably) raise the spectre of the "mischief" to which section 1(3)(b) is directed. In the eight months that she has been on the job, she has had some involvement in job postings for employees in the office unit, has participated in interviews, and has had a degree of "input" into the selection of the successful candidate - subject always to the overriding, and, on the evidence, decisive influence of the department or employment manager. Harold Blake indicated that her role was to ensure that there were no human rights violations. She also does a pre-screening of the applications for job openings in order to match the applicants' qualifications with those described in the job description accompanying the job posting. To this extent, she may influence the access of potential applicants to these job opportunities subject to review by her own supervisors to whom she directs any questions. If there is any complaint about the exclusion of particular individuals she may be involved in the discussion but, it is interesting to note that she said

that she would not be involved (and has not been involved) in any grievance concerning such matters. If her role were as significant as the employer now suggests, one would have thought that she would be involved.

53. Against these indicia of the *potential* existence of the “mischief” to which section 1(3)(b) is directed, one must consider the *absence* of concrete evidence about those matters (again, bearing in mind that Ms. Holtz has been in her position for only a short period of time).

54. Ms. Holtz has no employees under her immediate direction or control. She does no evaluation of other employees. She is not responsible for the wage increases or adjustments of other workers other than to record them. It is the company’s practice to start a new employee in a new job at the minimum rate for that position, but even that must be approved by the manager of compensation. There is no exercise of significant independent discretion.

55. Ms. Holtz has not been asked whether probationary employees are suitable for continued employment. She said that this was the foreman’s responsibility and, when she once made a recommendation about a particular student the matter had to be considered by others. It will be recalled that students and casual employees are not included in any bargaining unit. Accordingly, at this point, any concerns about their treatment do not raise collective bargaining dilemmas because they are not engaged in the process of collective bargaining.

56. Ms. Holtz told the Board that she had no authority to discharge or discipline employees nor had she ever been told that she had such authority. She has never reprimanded anyone for absenteeism, carelessness or other failings, and had not recommended discipline or improvement to the particular employees’ foremen. She has no authority to suspend employees, grant casual time off, or influence the scheduling of employee vacations.

57. She has no input or influence with respect to employee hours of work, shift changes or layoff decisions. She said that she might authorize overtime hours, in some circumstances, but would need the approval, first, from the manager of employee relations. On the evidence she had never done so, nor had she *required* overtime of persons who might not be willing to work it. She does not attend management meetings, neither does nor performs performance appraisals, and has made no recommendations with respect to employees promotions, or demotions. Initially, she said that she had no involvement in the hiring of full-time employees. In short, it is very difficult to conclude that she exercises any “managerial functions” within the meaning of section 1(3)(b) of the Act.

58. Nor does the testimony substantiate that she is *employed* in a *confidential* labour relations capacity.

59. She is involved in administering employee transfers but it is the department foreman who identifies the job opening. Transfers are voluntary and regulated by a list of employee preferences subject to seniority considerations. The department manager decides whether there will be a vacancy in any particular area and the job descriptions for such vacancy are based upon a pre-established format. The job posting is a relatively mechanical function, and to the extent that it requires some “fine tuning” for the particular circumstances, Ms. Holtz refers the matter to Diane Peters who is excluded from the bargaining unit. She has some responsibility for the hiring of casual employees, but once again, this is a fairly routine, mundane, and mechanical function quite unrelated to the process of collective bargaining from which these individuals are excluded. To the extent that “testing” is required, she merely administers tests to the applicants and, it would appear, other members of management may suggest that such tests are necessary. Transfers are

largely governed by seniority for, as Ms. Holtz observed, the collective agreement contains certain protections in this regard and, we “have to ask them [the senior employees] no matter what”.

60. Ms. Holtz testified that she had no input into labour-management negotiations. She has no access to material used by the employer in negotiating with the union. She does not type any documents respecting negotiations nor has she been involved (see above) in determining the employer’s response to particular grievances - although she may have provided certain background information at meetings attended by employer and union officials. She said that she had no input into or participation in the negotiation process. She was “not quite sure” if she had any role in the administration of the collective agreement, other than to ensure that the contractual standards set out in that agreement were, in fact, being followed.

61. On the evidence before us, we conclude that Ms. Holtz may have some occasional or peripheral involvement in labour relations matters but, to date, that has not been the core of her employment activities, nor, in our opinion, can it be said that she is *employed* in such confidential labour relations capacity. However, in her case in particular, we stress the fact that our opinion is based upon evidence relating to a relatively short tenure in her current job. It may be that, over time, as she acquires further responsibilities (perhaps then warranting the title of “senior employment assistant” which she found unfamiliar), her exclusion pursuant to section 1(3)(b) would be warranted.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. Save for the ruling respecting Josephine Fowler, I agree with the decision of my colleagues.
2. I would exclude Ms. Fowler from the bargaining unit because of her responsibility for the management payroll. She is employed in a confidential capacity in matters relating to labour relations.

2721-86-R Ontario Public Service Employees Union, Applicant, v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources, and KBM Forestry Consultants Inc., Respondents

Crown Transfer - Reforestation work contracted to KBM by Crown - KBM providing its own major equipment and mostly its own work force - Board interpretation of *Successor Rights (Crown Transfers) Act* not limited by Board jurisprudence on sale of a business provision in *Labour Relations Act* - Board finding transfer of work - KBM bound by collective agreement between Crown and OPSEU

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *F. C. Burnet* and *L. C. Collins*.

APPEARANCES: *Alick Ryder*, *Barbara Linds* and *Claudine Kovac* for the applicant; *Michael M. Fleishman*, *Linda H. Kolyn* and *Yeta Herscher* for the Crown; *Walter Thornton* and *Herb Bax* for KBM Forestry Consultants Inc.

DECISION OF PATRICIA HUGHES, VICE-CHAIR, AND BOARD MEMBER L. C. COLLINS;
March 25, 1987

1. In this case, the applicant Ontario Public Service Employees Union ("OPSEU" or "the union") seeks a declaration that there has been a transfer of an undertaking from the respondent The Crown in Right of Ontario ("the Crown") to the respondent KBM Forestry Consultants Inc. ("KBM") and that therefore KBM is bound by a collective agreement entered into between OPSEU and the Crown. The union contends that the transfer took the form of a subcontract by which KBM agreed to perform certain harvesting work which had previously been carried out by employees represented by OPSEU.

2. The Board heard evidence adduced by KBM and the Crown. The union did not call evidence. Rather than delay the resolution of this matter unnecessarily since the parties may be entering into further contracts in April, the parties agreed to make written argument by dates set by the Board at the hearing, with which dates the parties complied.

3. The work which was contracted to KBM formed part of a reforestation program for which the Ministry of Natural Resources ("the Ministry") has responsibility. The Thunder Bay Forest Nursery produces seedlings for that program. With respect to the work in issue (the harvesting of seedlings for transplanting), Ministry employees loosen the trees or seedlings; the Ministry is also responsible for transplanting the seedlings where it is indicated they are needed by the Ministry's unit foresters and clients. The work between those two stages (such as lifting, pruning, sorting, bundling, packaging and storing) is the work that was contracted to KBM. There is no dispute that OPSEU represented employees doing that work and that the Crown and OPSEU continue to be parties to a collective agreement covering the work in issue. Finding itself more concerned with employee matters (such as lateness) in 1985 than it would have liked, the Ministry decided to stress quality control in 1986 and believed that could be best accomplished through "contracting out" (the term used by the Crown in its submissions) the work. Robert Klapprat, who has been employed with the Ministry for almost 12 years and who is a supervisor at the Thunder Bay Forest Nursery, explained that the Ministry contracted the work "out" because it believed it could do it more economically and efficiently that way. In addition, the Ministry had access to funding which could be used for "contracting out", but had overextended themselves in relation to the budget for their own employees. KBM was the successful bidder. KBM has been incorporated since 1973 and is engaged in a variety of activities related to forestry quite independently of the work done under the contracts with the Crown. Because of its emphasis on quality control, when KBM was performing the contracts, the Ministry had crews at the work stations in the fields, taking samples from the assembly line to examine them for quality; however, supervision of the harvesters rested with KBM, thus relieving the Ministry of dealing with employee problems.

4. KBM and the Crown entered into two contracts dated November 10, 1986 in relation to the fall harvest carried out by the Ministry at its Thunder Bay Forest Nursery. One of these contracts ("contract A") required KBM "to lift, grade, count, bundle, root-prune and package nursery stock and to place the packages in refrigerated trailers at the lifting site on the Thunder Bay Forest Nursery of the Ministry of Natural Resources". The second of these contracts ("contract B") required KBM "to lift and to package nursery stock and to place the packages in refrigerated trailers at the lifting site on the Thunder Bay Forest Nursery of the Ministry of Natural Resources". KBM and the Crown had also entered into two contracts on May 5, 1986 ("the May contracts"), both of which required KBM to perform the same work as described in contract A, but during the spring lift. In addition, the same parties had entered into a contract dated July 21, 1986 ("the July contract") which required KBM "to lift and to transplant seedling trees supplied by the Crown at the Thunder Bay Forest Nursery of the Ministry of Natural Resources". All the con-

tracts contain definitions of relevant terms. The term “harvest” is defined differently in contracts A and B, reflecting the different work which KBM had agreed to perform; the term is defined in the May contracts in the same way as in contract A. There is no definition of “harvest” in the July contract, but the definition of “lift” is similar to the definition of “harvest” in contract A and the May contracts (in which “harvest” is defined partly with reference to “lift”). Specific instructions are set out in Schedule “A” to each contract. Where the work is similar, the Schedule “A”’s or relevant portions of them are also similar.

5. The work to be performed under contract A is thus the same as that specified under both May contracts (although KBM is under greater time constraints during the fall lift because then the trees go into storage and if wet, are vulnerable to fungi, while in the spring, they are planted almost immediately). The work under contract B is more limited than that under contract A and the May contracts. Part of the work required under the July contract is the same as that required under contract B; however, KBM did not contract to do transplanting in the fall, as it had in July.

6. Under contracts A and B, the Crown provided the stapler used to make the cartons in which the trees are placed, ties used to bundle the trees, waxed carton blanks which are made into the boxes the trees are shipped in to the planting site, water from the irrigation water system and plastic liners for the boxes. In addition, under contract A, the Crown provided two wagons at \$50.00 each and moss at the storage site. KBM provided a quad runner (an all-terrain vehicle), special trailers built by KBM to carry the trees, fold-up tables (also built by KBM), large pick-ups for moving trees in the boxes, personnel and supplies, a 10-foot truck for moving larger quantities of trees in boxes, two 66-passenger buses used to transport workers and in which the workers could place and store their personal effects, a flatbed trailer with a metal deck (KBM replaced the wooden deck) used as a processing station, rented toilet facilities, cleavers, large plastic sheeting to spread over seedlings to prevent frost settling on them and lights on a generator to permit work into the night.

7. Most of the supervisory personnel on these contracts were permanent and long-term employees of KBM. The other employees (the lifters, bundlers, packers and so on) were hired specifically for the project through interviews with an individual at the local Canada Employment and Immigration (“Employment Canada”) office. In total, approximately 260 employees worked on these contracts. During the period of the contracts, there was a high turnover of employees. To obtain local employees who would be interested in the work involved, KBM obtained a list of individuals who had previously worked for the Ministry on the lifting projects; the list was passed on to the interviewer at Employment Canada. Approximately 18 people who had previously done work in this area for the Crown seem to have been hired by KBM.

8. That KBM may have provided its own major equipment and, for the most part, its own work force however, does not mean that the contract between KBM and the Crown does not fall within the framework established by section 2 of the *Successor Rights (Crown Transfers) Act* (also referred to as “section 2”). It is not surprising that the Crown would contract work to an established company which already possesses the expertise, equipment and significant personnel required.

9. When KBM was engaged in the spring lift, the Ministry also had lifters employed in adjoining fields. That was not the case in the fall. Nevertheless, Herb Bax, President of KBM, agreed that there was no difference between the work KBM’s staff was required to do under the fall contracts and the work the Ministry staff had done previously except counting (necessary as part of the Crown’s extensive quality control process and in order to determine what was to be paid

to KBM) and that the purpose in both cases was to lift and bundle trees to put on line for storage for later planting or reforestation. Klapprat testified that the procedures under the fall contract and those followed by the Ministry were similar, although the method of production has changed in response to technological developments. However, there had been a reversion from mechanical harvesting to manual when the number of rows planted per bed was increased (although mechanical harvesting actually continued until the fall of 1985, even though the change in density had occurred in 1983-84). In the fall of 1985, the Ministry had hired about 120 employees.

10. The relevant portions of the *Successor Rights (Crown Transfers) Act* are as follows:

1.-(1) In this Act,

• • •

(f) "transfer" means a conveyance, disposition or sale;

• • •

(h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.

(2)-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

Comparable provisions under section 63 of the *Labour Relations Act* (also referred to as "section 63") are as follows:

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto

• • •

In both statutes, there is provision for the Board to determine the composition of the bargaining unit where it is necessary to do so.

11. The *Successor Rights (Crown Transfers) Act* was enacted to fill the gap left by the fact that section 63 of the *Labour Relations Act* does not apply to the Crown: *Municipality of Metropolitan Toronto*, [1975] OLRB Rep. Oct. 777. In enacting the new statute, however, the Legislature employed wording different from that found under the parallel section 63 of the *Labour Relations Act*. That wording reflects the nature of certain of the wide range of activities engaged in by government. Thus even though jurisprudence under section 63 of the *Labour Relations Act* is applicable to applications under the *Successor Rights (Crown Transfers) Act* (see, for example, *The Ministry of Natural Resources*, [1986] OLRB Rep. March 331), cases under the latter statute must be considered in the context of the wording of that Act. As the Board said in *The Ministry of Natural Resources*, *supra*, at paragraph 4, "the *Successor Rights (Crown Transfers) Act* was intended to

apply *at least* to circumstances analogous to those in which the Board has found a 'sale of a business' under section 63 of the *Labour Relations Act*" (emphasis added). The Board's interpretation of section 2 of the *Successor Rights (Crown Transfers) Act* is not limited by its interpretation of section 63 of the *Labour Relations Act*, but must be given a broad interpretation (a general principle also applied to section 63) which takes into account the extensive definition of "undertaking". For example, in our view, it does not require the transfer of physical assets, as suggested by counsel for KBM, nor does the length of the contract affect whether it is a "transfer", as suggested by counsel for the Crown. Underlying the legislation is the recognition (a recognition also underlying section 63 of the *Labour Relations Act*) that "the continuity of the work performed before and after the transfer [is of "particular significance"], since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section [63] is to preserve both the bargaining relationship and the collective agreement": *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, paragraph 32, cited in *The Ministry of Natural Resources, supra*. More specifically in the context of the *Successor Rights (Crown Transfers) Act*, the gains achieved by the union with respect to the jobs which are integral to a particular government program are not to be lost through the government's transferring that program (and those jobs) to a private entity (and *vice versa*). From another perspective, it may be said that whatever protections or conditions accrue to those jobs through representation by the union are not to be threatened through the government's transferring the program or portion of a program, of which they are a part, to a private entity.

12. It has been held that under section 63, the transfer of work alone does not meet the requirements of the section: see, for example, *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 and *Corporation of the City of Stratford*, [1985] OLRB Rep. June 923. Under section 63, that which may be sold is the predecessor employer's business or portion of a business which has been defined in relation to economic organization, including physical assets, operating personnel and goodwill: *Metropolitan Parking Inc.*, *supra*, and cases cited therein. Under section 2, on the other hand, that which may be transferred or conveyed includes "projects" or "programs" or "work". We do not necessarily conclude that "work" within the meaning of section 2 means the same type of work as that the transfer of which does not alone satisfy the requirements of section 63, i.e., the performance of labour; more appropriately, work must be read within the context of the word "undertaking". However, it is not necessary for us to decide that issue in this case. We are satisfied that in this case a "program" or "project" is the most relevant form of undertaking listed in section 2. A program or project may be defined as the interrelated steps or functions (or "the work") established for the purpose of achieving a particular objective. The concept of "title" cannot attach to a project or program (although title to equipment or land might pass; however, we have already said that the transfer of either equipment or land is not necessary to a transfer within the meaning of section 2). Here, the Crown is involved in a reforestation project or program, operating out of its Thunder Bay Forest Nursery, and as part of that project or program, it is necessary to harvest seedlings which will later be replanted. A portion of this harvesting, following upon the loosening of the soil and prior to the actual replanting, was, but is no longer, done by the Ministry; it is now done by KBM. The Ministry has transferred (or "disposed" of) that part of the project to KBM, although it retains an interest in ensuring that the work performed by KBM is performed in a manner consistent with the standards established by the Ministry for the reforestation program. That brings it squarely within section 2 of the *Successor Rights (Crown Transfers) Act*. We are satisfied that there has been a continuation of the work and jobs, that OPSEU is the bargaining agent for employees performing that work and that the Crown and OPSEU are parties to a collective agreement applying to that work.

13. Accordingly, we declare that there has been a transfer from the Crown to KBM of the

work encompassed by contracts A and B and that KBM is bound by the collective agreement entered into by the Crown and OPSEU.

14. Counsel for the respondent has requested that if we were to find that there had been a transfer of an undertaking from the Crown to KBM that we then determine the unit of employees that is appropriate for collective bargaining pursuant to section 4(1) of the *Successor Rights (Crown Transfers) Act*. This matter was not addressed by either of the other parties. Accordingly, we invite submissions on this particular issue and decline to comment further upon it until such submissions have been received and considered.

DECISION OF BOARD MEMBER F.C. BURNET;

1. The majority has stated that although the jurisprudence under the *Labour Relations Act* on this issue applies to the *Successor Rights (Crown Transfers) Act*, (hereinafter referred to as the Crown Act), nevertheless Crown Act cases must be considered against the words of that Act.

2. The wording of that Act clearly and specifically defines the kind of “transfers” (of a “business, enterprise, institution, program, project, work, or a part of any of them”) that trigger section 2. Only those transfers which constitute a “conveyance, disposition or sale” trigger the section.

3. Each of these latter three terms has a precise legal meaning. A “conveyance” denotes a transfer of title; a “disposition” means the parting with, alienation of, or giving up of property; and “sale” is a contract in which one party transfers to the other, for payment, title and possession of property. These are closely related concepts and each of them connotes an ultimate divestiture or an alienation of rights. By their exclusive use in section 2, they impart to the general and imprecise word “transfer”, the foregoing explicit meanings - and only those meanings.

4. The facts and circumstances surrounding this transaction are fully set forth in the majority award. Clearly, there was a re-assignment of work from the Ministry to KBM, but equally clearly, there was not a “transfer” within the explicit definition of that term. There was no conveyance, there was no disposition, and there was no sale within the legal meaning of those terms. No titles changed hands in respect of land, equipment, goodwill, or any other assets or property, whether tangible or intangible; nor any alienation or surrender of property; nor any payment allied to such transactions. Since there was no “transfer” within the defined meaning of that term, whether or not the transaction met the definition of “undertaking” in the Act is not pertinent.

5. In paragraph 10, the majority notes the difference in wording between the relevant sections of the Crown Act and the *Labour Relations Act*, and because of that difference concludes that in this case, the Board is not limited by its established interpretation of section 63 of the latter Act. I note however that while the general purpose and intent of the two provisions is the same, the wording of the Crown Act is, if anything, more precise and limiting, in that the word “transfer” is the very word that is being defined and made specific. In the *Labour Relations Act* “transfer” is but part of the definition of the operative word “sell”, and its precise meaning is influenced if not determined by the companion words “lease” and “disposition”. I conclude that the different wording of the Crown Act is not intended nor does it broaden the meaning relative to the *Labour Relations Act*, but simply expresses the same intent more precisely. That being so, to whatever extent the jurisprudence under the *Labour Relations Act* is applicable to the Crown Act on this issue, it is not limited by the difference in the construction of the two sections.

6. The successor rights provisions of the *Labour Relations Act*, which preceded the Crown Act were intended to preserve bargaining rights when there was a change in business ownership or

in the legal entity representing the business. They were not intended to curtail or govern subcontracting practices, which might be undertaken for a variety of legitimate business reasons, including not only labour cost considerations but such objectives as stabilization of employment levels in a fluctuating work load situation, reduction of capital costs, the securing of skills not otherwise available internally, meeting peak customer demand, or, as in this case, an improvement in quality. The control of such practices is left to the bargaining process and their enforcement is through the agreements' dispute settling provisions. The distinction between the two comments has been carefully set forth in jurisprudence, notably, *The British American Bank Note Company*, [1979] OLRB Rep. Feb. 72 at page 74:

There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. *While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.*

[emphasis added]

Similarly in *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293 at page 1295, the Board in dismissing an application commented:

Given the purpose and broad language of section 63, the Board has given the section a liberal interpretation and not placed undue reliance on the legal form which a business disposition happens to take. This does not mean, however, that every business decision which prejudicially affects a Union's bargaining rights will be viewed as falling within the ambit of section 63. In particular as the Board indicated in the *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193, the transfer of work standing by itself will generally not be sufficient to trigger the application of section 63.

Given the identity of intent and meaning of the two Acts, I think this jurisprudence has equal application to this case.

7. Finally, if the simple and straightforward sub-contracting operation here involved is to be governed by the successor rights provisions of the Act, it becomes difficult indeed to think of any instance of sub-contracting that would not trigger the section. As a practical matter therefore, the consequence would be to virtually ban sub-contracting. If so sweeping a departure from established business practice and from established Board interpretations and jurisprudence had been intended by the particular wording chosen for the Crown Act to govern Crown enterprises, surely it would have been publicly debated and specifically provided in the legislation in unequivocal terms, and not left to controversial judicial interpretation.

8. For these reasons, I would dismiss the application.

1498-86-R Canadian Union of Public Employees, Applicant, v. Lapalme Nursing Home Ltd., Respondent, v. Group of Employees, Objectors

Certification - Practice and Procedure - Representation Vote - Vote held in part-time and full-time bargaining units - Five employees in part-time unit moving to full-time unit before date vote held but voting in part-time unit - These employees not eligible to vote in either the part-time or the full-time unit - New vote ordered in part-time unit - Voter eligibility rules reviewed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *F. W. Murray* and *R. R. Montague*.

APPEARANCES: *Helen O'Regan* for the applicant; *Larry Crossan* and *Lucette Lapalme* for the respondent; *Deanne Barber*, *Giselle Blanchard*, *Giselle Giroux* and *Philippe Quesnel* for the objectors.

DECISION OF THE BOARD; March 2, 1987

1. By decision dated October 20, 1986, another panel of this Board directed that a representation vote be taken of the employees of the respondent in the following bargaining units:

Bargaining Unit #1

all employees of the respondent in Embrun save and except professional medical staff, registered, graduate and undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, occupational therapists, office and clerical employees, supervisors, persons above the rank of supervisor, persons employed for not more than twenty-four hours per week, and students employed during the school vacation period; and

Bargaining Unit #2

all employees of the respondent in Embrun employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, occupational therapists, office and clerical employees, supervisors and persons above such rank.

In ordering the representation vote, the Board made its normal direction concerning voter eligibility:

all employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

2. Pursuant to the Board's direction, a vote was conducted on December 12, 1986 on the respondent's premises at Embrun. The voters' list for bargaining unit #1 contained the names of 32 persons, 31 of whom cast ballots. The ballot of Deanne Barber was segregated and not counted on the agreement of the parties since the respondent took the position that Barber exercised managerial functions within the meaning of section 1(3)(b) of the Act. The voters' list for bargaining unit #2 contained the names of 47 persons, 46 of whom cast ballots. Subsequent to the taking of the representation vote, the ballots were counted on agreement of the parties. The difference in the number of ballots marked in the applicant's favour and the number of ballots marked against the applicant is four in bargaining unit #1 and one in bargaining unit #2. A notice to employees (Form 70) was posted advising employees of their right to make timely representations as to any matter relating to the representation vote.

3. On February 22, 1987, the Board received the following letter signed by five employees:

December 18, 1986

Ontario Labour Relations Board

400 University Avenue

Toronto, Ontario

M7A 1V4

Dear Sir:

We are employees of Lapalme Nursing Home in Embrun, Ontario.

On Friday, December 12, a vote was taken at the Nursing Home in order to see if the employees wanted to be represented by the Canadian Union of Public Employees. The board officer was Tim R. Parker.

A number of us are upset because we feel the vote was not representative of all of the employees for the following reasons.

1. Four employees are now considered full time and voted in the part-time. They are:

Joan Merkley

Raymond St. Pierre

Jacynth Daze

Lise Labelle

2. We have new employees who started shortly after the October 20th date and who feel they should have been allowed to vote. They are:

Joanne Lewis

Linda Power

Julie Boulerice

Todd Dupuis

We feel another vote should be taken in order that a fairer result would be had which would include ALL staff.

If you would like we could take up a petition among the staff about having another vote - we are confident that more than 60% of the staff would like another vote. Due to the fact you must have a closing date of December 22 we felt pressed for time so did not take up a petition. However, if you would be so kind as to give us until January 9 we are certain many of the employees would be very grateful for a chance to vote again.

Thank you for your consideration in this matter,

Yours truly,

(5 signatures)

4. On January 16, 1986, the Board held a hearing for the purpose of entertaining the evi-

dence and the representations of the parties with respect to the representation vote held on December 12, 1986. The parties were in agreement on the facts. Five employees who were employed in the part-time bargaining unit on the date the Board ordered the vote, who were on the part-time voters' list, and who voted in the part-time unit, were employed in the full-time unit on the date the representation vote was held. Between the date the vote was ordered and the date the vote was conducted, three persons left bargaining unit positions and four persons were hired into bargaining unit positions. Two persons were employed in the part-time unit as replacements for a temporary period which began prior to the date the vote was ordered and ended after the date the vote was held.

5. The representative of the objecting employees, Ms. Barber, submitted that the Board should direct the taking of new representation votes in both the full-time and part-time bargaining units. As a general proposition, Ms. Barber argued that due to the extent of the movement of employees from the part-time unit to the full-time unit, the number of persons who left or were hired in the bargaining units between the date the vote was directed and the date the vote was taken and the fact that two persons who voted were employed on a part-time basis for a temporary period, the vote held on December 12, 1986 was not representative of all of the employees. Specifically, Ms. Barber argued that:

- (1) the two persons hired for a temporary period should not have been eligible to vote;
- (2) the four persons who were hired after the vote was ordered and prior to the date the vote was held should have been given the opportunity to vote; and,
- (3) the five persons who participated in the part-time unit vote but were employed in the full-time unit on the day of the vote should not have voted in the part-time unit and should have voted in the full-time unit.

Counsel for the respondent supported the positions taken by Ms. Barber. The applicant's representative argued that, in the circumstances, the Board should not direct the taking of new representation votes in either the full-time or part-time bargaining unit.

6. This is not the first occasion where the Board was confronted with the kind of issues raised in this case. The Board's practice concerning the manner in which it determines voter eligibility has been consistent for well over twenty years. In *Canadian Westinghouse Company Limited*, [1966] OLRB Rep. Sept. 372 at paragraph 6, the Board set forth its interpretation of its standard direction concerning voter eligibility:

The Board's standard direction for the taking of a representation vote, as quoted above, cites only two instances in which a person who was an employee in the bargaining unit on the date the vote was directed forfeits his eligibility to vote, namely, where he voluntarily terminates his employment or is discharged for cause before the date the vote is taken. The Board, however, has not attempted in its standard direction to define exhaustively all of the contingencies under which a person who was an employee in the bargaining unit when the vote was directed would cease to be eligible to vote. *The Board has consistently interpreted its direction to mean that a person who, between the date of the direction and the date of the vote, has ceased to be a member of the bargaining unit, is disqualified from participating in the vote, whether because of voluntary termination of employment, discharge for cause, indefinite lay-off in some circumstances, or transfer to a position out of the bargaining unit.* Stated another way, the policy of the Board is

that a person must be an employee in the bargaining unit both on the date the vote is directed and on the date of the taking of the vote in order to be eligible to cast a ballot...

[emphasis added]

7. In *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. Apr. 461, it was argued that a person who, prior to the vote, had given notice of an intention to terminate her employment effective on a date subsequent to the vote should not be eligible to vote. The Board had little difficulty in concluding that this person was entitled to vote and proceeded to deal with an argument that, in any event, the result of the vote should not be allowed to stand. The Board ultimately decided not to disturb the results of the vote. In arriving at this result, the Board canvassed a number of the Board's decisions concerning voter eligibility and made comments which are applicable to the circumstances of this case and worth reiterating:

15. Certification is the primary process in the *Labour Relations Act*. It is the means by which the wishes of employees for representation are transformed into the affirmative right of a union to bargain collectively on their behalf with their employer. Generally, apart from exceptional cases involving extreme unfair labour practices, certification is accomplished by an application of majoritarian principles. A union can be certified by demonstrating support in excess of 55% of the bargaining unit through membership cards. It can also be certified by obtaining a simple majority of the ballots cast in a representation vote. These are the two normal routes to certification under the Act. Both of these procedures require the application of percentages to a defined number of employees. Because employees may continuously come and go through hiring, lay-offs, leaves of absence, quitting and discharge, the Board has had to devise some general rules to apply in order to fix a clear and stable figure of employees in a given bargaining unit for the purposes of an application for certification.

16. There are a number of ready illustrations of those rules. The Board has devised, for example, a "terminal date" as a cut off point for assessing the number of membership cards filed by a union and statements in opposition to certification filed by employees. The Board refers to the date that an application is filed for assessing the number of employees in the bargaining unit. (See *R. v. OLRB, Ex parte Hannigan*, [1967] 2 O.R. 469 (C.A.)). And it has developed a "thirty day rule" to determine whether an employee absent on the date of application is to be counted within the bargaining unit for the purposes of the application (*Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840). The Board has also evolved "a seven week rule" as a rule of thumb to assess which employees will be viewed as full-time and which as part-time for the purposes of an application. (*Sydenham District Hospital*, [1967] OLRB Rep. May 135). These are procedural constructs whose application may mean victory or defeat for either party in any particular application. If all of the lines established by these rules were to be redrawn on a case by case basis the certification process would come to a standstill. These established principles are known to the labour relations community and parties coming before the Board can plan on the basis of them. While none of the above rules are entirely inflexible, there is a substantial onus on any party who seeks to have the Board depart from them in a particular case. (*Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 805).

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board's published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g. *The Borden Co. Ltd.*, (1946), 46 CLLC ¶16,461) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter's lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

18. In this case the respondent and the objecting employees invite the Board to adopt a different rule. They submit that if an employee has indicated an intention to leave the workplace he or she should not be permitted to influence the outcome of a representation vote. When pressed on

the point, however, they are less than clear as to how that principle can be applied in any general way. Is an employee to be deprived of this franchise if, before a representation vote, he indicates an intention to leave his employment within three weeks of the vote? Or three months? Or six months? And is the result of a closely contested vote to be disturbed if an employee who voted is transferred, quits or is discharged within a day or two after the vote? The Board must obviously adhere to a rule that gives some certainty and finality to the granting of bargaining rights and which can be readily understood and applied by the parties.

19. The Board's past decisions give considerable guidance in the application of the rules regarding the eligibility of employees to vote in the selection of a bargaining agent. Employees on lay-off without a definite date of recall have been held ineligible to vote (*Rix Athabasca Uranium Mines Limited*, [1961] OLRB Rep. July 127). The Board has found that a person who was an employee in the bargaining unit on the date the vote was ordered and was promoted to acting foreman on the date the vote was taken was ineligible to cast a ballot, notwithstanding that he later returned to the bargaining unit (*Success Display Limited*, [1971] OLRB Rep. Oct. 636). An employee who was absent on Workmen's Compensation on the date the vote was ordered and on the date the vote was taken, but who had neither quit nor been terminated was found eligible to vote (*Alex's Plumbing and Heating Limited*, [1970] OLRB Rep. Feb. 1321). Where, on the other hand, an employee who was absent due to illness had been treated in all respects as terminated and had no real prospect of returning to work, the Board concluded that he was not eligible to vote (*Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723).

20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover. From the Board's earliest days employees were not removed from the voter's list unless they had left their employment before the taking of the vote. The only recorded exception to this appears to have been in wartime: under P.C. 1003, the *Wartime Labour Relations Regulations*, the Board's practice was to exclude from voting eligibility an employee who prior to the taking of the vote had obtained a separation notice pursuant to Selective Service regulations. An employee subject to that irrevocable step was viewed as no longer sufficiently interested in employment relations in the plant to be entitled to influence the outcome. (*Packard Electric Co. Ltd.* (1944), 46 CLLC ¶16,424). There appears to be no other recorded variation from the Board's rules.

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification. Any deliberate attempt to manipulate the eligibility rules and temporarily "pack" the voting constituency to influence the outcome of the vote can be dealt with through the Board's remedial authority in unfair labour practices (see e.g. *Custom Aggregates*, [1978] OLRB Rep. Mar. 215). Any distortion in the selection process caused by a planned and *bona fide* substantial increase in the size of the bargaining unit in the near future can be accommodated by the application of the Board's build-up principles (*Emil Frant* 57 CLLC ¶18,057; *McCord Corporation*, [1965] OLRB Rep. June 203; *Domco Foodservices Limited*, [1980] OLRB Rep. Jan. 33). While the Board deals with these kinds of substantial changes in the bargaining unit, it cannot concern itself with the inevitable fact that some employees who are eligible to vote may have a more temporary or transitory interest in their job than others.

22. The Board has long recognized the right to vote of employees who are transitory, so long as they conform to the minimum requirement of the Board's two-pronged eligibility rule. If they are employed on the date the vote is ordered and continue to be employed to the date the vote is taken, they are entitled to vote. In *J. McLeod & Sons*, [1969] OLRB Rep. Dec. 1100, the Board confirmed the eligibility to vote of a group of employees who fell within the eligibility dates but who in fact had been hired temporarily. They were strikers from a nearby plant who expected to return to their normal employment at some indefinite future date. And in *University of Toronto*, [1974] OLRB Rep. May 267, the Board confirmed the right to vote of all teaching assistants and research assistants employed by the University even though the vote was con-

ducted in May, at the end of the academic year, and a turnover rate of 25 per cent to 35 per cent of the bargaining unit was projected for the next academic year.

23. The selection of a bargaining agent under the Act cannot be conducted on the basis of an ongoing referendum geared to the daily, weekly or monthly changes in the people who make up a bargaining unit. But bargaining rights are not necessarily permanent, and the Act allows for shifts in the wishes of employees whether through the turnover of personnel or otherwise. Any changes in the sentiment of a majority of the employees about union representation over time can be dealt with through the provisions of the Act for the termination of bargaining rights.

8. In the circumstances of this case, the Board is satisfied that a representative group of employees participated in the vote in both the full-time and part-time bargaining units. The changes in personnel and the movement of persons from one bargaining unit to another are not significant when compared to the total number of persons employed in those bargaining units.

9. Although the Board's rules with respect to voter eligibility are not inflexible, there is a substantial onus on a party who seeks a departure from the Board's usual practice. On the facts before us, the Board is satisfied that it would be inappropriate to alter its normal rules. In applying the rules regarding the eligibility of employees to vote to the specific matters of concern raised by Ms. Barber, the Board finds as follows:

- (1) the two employees who were hired for a temporary period were eligible to vote in the part-time bargaining unit. These two employees were employed in the part-time unit when the vote was ordered and when the vote was held. The fact that these employees were hired for a temporary period does not affect their eligibility to vote. (See, *London District Crippled Children's Treatment Centre, supra*, and *J. McLeod & Sons*, [1969] OLRB Rep. Dec. 1100);
- (2) the four employees who were hired subsequent to the time when the Board ordered the vote were not eligible to vote. Although these employees were employed in a bargaining unit on the date the vote was held, they did not meet the first element of the two-pronged eligibility rule; and,
- (3) the five employees who were employed in the part-time unit when the vote was ordered and were employed in the full-time unit when the vote was held were not eligible to vote in either the part-time or the full-time unit. These five employees were not entitled to vote in the part-time unit since they were not employed in the part-time unit when the vote was held. These employees should not have a role to play in the selection of a bargaining agent for the part-time employees when they have become strangers to the part-time unit. The five employees were not eligible to vote in the full-time unit since they were not employed in that unit when the vote was ordered. In essence, their position is no different from that of the four employees who were hired after the vote was ordered insofar as any connection they have to the full-time unit. The fact that the five employees were employed by the respondent when the vote was ordered is not persuasive. An office employee or a managerial employee who was transferred into the full-time unit after the vote was ordered also would not be eligible to vote. By agreeing to separate bargaining units for the full and part-time employees, the parties recognized, as

does the Board, that employees within each of these units have different collective bargaining interests. In our view, therefore, the fact that we are dealing here with the transfer of employees from the part-time to the full-time unit rather than a transfer from a sales or office unit to the full-time unit should not affect the application of the Board's normal rules regarding voter eligibility.

10. As a result of the above findings, the Board declines to disturb the result of the representation vote held for the full-time bargaining unit on December 12, 1986. Those persons who voted in the full-time unit were eligible to vote and no eligible voter was deprived of the opportunity to vote. On the taking of the representation vote directed by the Board more than fifty-five percent of the ballots cast were cast in favour of the applicant. Accordingly, a certificate will issue to the applicant for bargaining unit #1.

11. As a result of the above findings, the Board directs that another representation vote be held in the part-time bargaining unit. Five persons who were ineligible to vote in the part-time unit voted in that unit. It is clear from the results of the vote in the part-time unit that the outcome of the vote may have been different if the five persons had not voted. Although the trade union has not requested a new vote in the part-time unit, it did not request leave to withdraw its application for certification as it related to the part-time unit. In any event, the Board has an interest in ensuring that its votes are conducted in accordance with its rules.

12. A representation vote will be taken of the employees of the respondent in bargaining unit #2. All employees in bargaining unit #2 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

13. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

14. The matter is referred to the Registrar.

15. Subsequent to the hearing, the Board received two letters signed by three persons who were transferred from the part-time unit to the full-time unit prior to the time the vote was held. The matters referred to in these letters are matters which Ms. Barber addressed at the hearing.

2066-86-R International Union of Operating Engineers, Local 796, Applicant v. Metropolitan Life Insurance Company, Respondent v. Allen Maintenance Ltd., Intervener

Sale of a Business - Respondent insurance company having obligation central to its business as a landlord regarding the provision of cleaning services to its tenants - Cleaning services contracted out for reasons of economy - Bona fide contracting out arrangement and not a sale of a business - Application dismissed

BEFORE: *J. Harold Brown*, Q.C., Vice-Chair, and Board Members *A. Hershkovitz* and *R. M. Sloan*.

APPEARANCES: *Peter I. Waldmann* for the applicant; *D. Churchill-Smith*, *J. D. Roffey* and *D. E. Gibson* for the respondent; *Eliot Supino* for the intervener.

DECISION OF THE BOARD; March 10, 1987

1. This is an application made under section 63 of the Act.
2. In its application, the applicant simply stated that the intervener is the successor employer to the respondent and further, that as a result of a sale of a business the intervener is bound by a collective agreement entered into by the applicant and the respondent. In its application (as amended at the Board hearing on January 6 and 7, 1987), the applicant stated that a change in the character of the business so that it is substantially different from the business of the predecessor employer had *not* taken place. The application further states that an intermingling of employees of one business with employees of another business represented by the applicant has *not* taken place. The relief claimed by the applicant is an order and declaration that the intervener is bound by a collective agreement in existence between the applicant and the respondent.
3. By letter dated January 5, 1987, in response to a request for particulars made by the respondent dated December 19, 1986, the applicant stated as follows. The respondent carries on the business of a landlord. It has obligations central to its business as a landlord regarding the provision of the cleaning and janitorial services of its tenants. These obligations require the respondent to maintain control and direction of the provision of such cleaning services and that such cleaning and janitorial services are provided within the respondent's own premises. Further, such cleaning and janitorial services are provided, using material and equipment belonging to the respondent, under the supervision and control of the respondent's own employees. In its particulars, the applicant asserts that in subcontracting the provisions of cleaning and janitorial services to the intervener the respondent acted in bad faith.
4. The respondent denies that a sale of business by it to the intervener has taken place as alleged by the applicant and the intervener denies that there was any transfer, lease, sale or any other manner of disposition under section 63 of the Act.
5. All of the evidence adduced at the hearing was given by David Gibson, the assistant counsel with the respondent in its Canadian head office in Ottawa, and Eliot Supino, the president of the intervener. Based on their evidence, the Board makes the following findings of fact.
6. The respondent is in the business of producing and marketing life and health insurance and annuities.

7. The respondent owned a building, 180 Wellington Street in Ottawa, from 1924 to 1976, which premises housed its head office staff. It occupied the entire building and no offices were leased to tenants. In 1976, the federal government confiscated these premises for its own use.

8. The respondent acquired land on which was built the first of two twin towers. The building which is known as 99 Bank Street has continued to house the Canadian head office of the respondent. There are fifteen (15) floors in the tower at 99 Bank Street. The top floor is occupied by the Rideau Club under a condominium arrangement. The expenses in operating the physical premises are allocated on a pro-rated basis between the respondent and the club. The respondent occupies for its own purposes thirty percent (30%) of the building. The remainder of the fourteen (14) floors are occupied by tenants, of which there are approximately twenty-four (24). Since it occupied the 99 Bank Street tower, the respondent has provided maintenance and cleaning services for its own offices and those of its tenants. Until the fall of 1985, this service was provided the respondent's own employees.

9. The respondent acquired land on which was built the second of the two twin towers. The building, which is known as 50 O'Connor Street, contains offices occupied by the respondent. However, the building is largely occupied by tenants under lease. The respondent took possession of the building on November 1, 1984. Prior to the commencement of business at 50 O'Connor Street, the respondent invited tenders from various office cleaning service companies to perform this function for all of the occupants of the building. Based on the tenders submitted by the intervener, it was awarded a two-year contract.

10. Because of the satisfactory maintenance and cleaning services provided by the intervener, it was invited by the respondent in 1986 to submit a bid to provide the same services at 99 Bank Street. The management committee of the respondent approved the bid, which resulted in the respondent and the intervener entering into a Building Cleaning Contract dated September 22, 1986. The contract was signed by Andre Vauclair, the vice-president of real-estate investment for the respondent. The intervener commenced to provide cleaning services for the respondent and its tenants on October 15, 1986 for a twenty (20) month period.

11. The cleaning services were contracted out by the respondent to the intervener at 99 Bank Street for reasons of economy. By the calculation of the respondent, the cost of the intervener providing the cleaning services with the intervener's own materials, equipment and labour was some fifty percent (50%) cheaper than the cost of providing the same services with the respondent's own employees.

12. At no time was the intervener involved in discussions with the respondent in respect of the transferring, acquiring or hiring of any of the employees of the respondent. All staffing was done by the intervener in the same manner as for any other job site, i.e., through the personnel department of the intervener and advertising in the local newspapers.

13. The intervener has some two hundred (200) clients in Ottawa and Hull to which it provides cleaning services. Most of them are developers and owners of buildings. The respondent's cleaning service contract covering 50 O'Connor Street and 99 Bank Street constitutes less than five percent (5%) of the business of the intervener.

14. Upon taking over the cleaning operations at 99 Bank Street on October 5, 1986, the intervener assumed full control and established the requirements of the respondent and its tenants as well as their complaints in log books. The respondent had previously followed the same procedure. The intervener deals directly with the property management staff of the respondent. However, any tenant requirements or complaints made to the respondent are referred directly to the

intervener. The intervener maintains an on-site supervisor on the premises to direct the work force of the intervener.

15. As a result of the takeover of the cleaning services at 99 Bank Street by the intervener pursuant to the September 22, 1986 Building Cleaning Contract, the respondent terminated the services of some 48 part-time employees, as well as ten (10) full-time employees. The respondent retained in its employ 2 painters, 3 electricians and 6 porters. There is a current collective agreement in force between the applicant and the respondent, covering building maintenance and cleaning operations. This agreement which is in force from July 1, 1985 until June 30, 1987 encompasses the eleven Local 796 members who remain in the employ of the respondent at 99 Bank Street.

16. Former cleaning employees of the respondent were allowed to apply for employment with the intervener under the same terms and conditions available to all job applicants. Some six former employees of the respondent did make inquiries concerning employment, but none of them wanted to work on evening shifts or meet the productivity rates of the intervener. The intervener did not buy or receive any equipment or materials from the respondent. The intervener only received a contract to perform cleaning services at 99 Bank Street.

17. The intervener hired twenty-five (25) employees for light duty cleaning at 99 Bank Street when it took over cleaning operations for the building.

18. The applicant union did not object to the contracting out by the respondent to the intervener of the cleaning services at 50 O'Connor Street for a two-year term commencing November 1, 1984. Further, the applicant union has not filed a grievance under the current collective agreement covering its own maintenance and cleaning staff at 99 Bank Street protesting the contracting out of the cleaning services to the intervener.

19. There is no relationship between the respondent and the intervener in the sense that there are no common owners, directors or staff. The intervener has carried on an independent cleaning services business since 1967.

20. Article 7(b) of the Building Cleaning Contract dated September 22, 1986 covering 99 Bank Street between the respondent as "owner" and the intervener as "contractor" provides as follows:

Any person employed on the work who is disorderly, incompetent or unacceptable to the Owner for security reasons shall be removed immediately when required by the Owner and no such person shall be re-employed on any part of the work without the consent of the Owner.

The above is a standard clause in building cleaning contracts. It appears in the Building Cleaning Contract dated February 15, 1985 between the respondent and the intervener covering 50 O'Connor Street.

21. The intervener provides its own supervisory staff for its cleaning employees and takes any disciplinary action that is called for in respect of them.

22. Counsel for the applicant made the following submissions. The respondent is in the business of being a landlord for a large number of tenants at 99 Bank Street that have leased space on the premises. While the respondent claims to be solely in the life and health insurance and annuities business and characterizes the rental of a majority of the building that it owns at 99 Bank Street as an investment, the applicant took the position that the respondent is in the businesses of both insurance and of being a landlord. In other words, being a landlord is a part of the respondent's business. Indeed, the applicant pointed out, the respondent has a Real Estate division which

handles the respondent's leasing operations at both 99 Bank Street and 50 O'Connor Street, including a Vice-President who is responsible for that division. Further, the respondent has a property management department.

23. Since being a landlord is a part of the respondent's business, the applicant contends that by contracting out the janitorial and cleaning services provided to its tenants the respondent has made a disposition of a part of its business. In section 63 of the Act, "business" includes a part thereof. Further, "sells" includes leases, transfers and any other manner of disposition. While it was conceded that no assets have been taken over by the intervener from the respondent, it was argued that equipment and supplies are a minor part of the business. The major part is the labour.

24. Counsel submitted that it is simply necessary to show that there has been a transfer of a part of a business, which there has been in the instant case. Counsel relied on the *Toronto College Street Centre Limited* [1986] OLRB Rep. June 913 case in support of its position.

25. Counsel for the respondent made the submission that the respondent is in the insurance and annuity business and acquired the building at 99 Bank Street not only for the location of its head office but also as an investment peripheral to the respondent's business. The decision to contract out the cleaning services by the management committee of the respondent was based solely on economic considerations. More particularly, this service could have been provided by the intervener for half the price it was costing the respondent.

26. The respondent noted that the contract for cleaning services was given to an independent cleaning firm and constituted only five percent (5%) of the intervener's total business. What was done by the respondent with respect to its cleaning services at 99 Bank Street was exactly what was done at 50 O'Connor Street in 1984 without protest by the applicant. That is, the respondent contracted out its cleaning services to the intervener. There was no sale of any assets and no employees were transferred from the respondent to the intervener. It was entirely an arms-length transaction. It was submitted that the respondent is not in the business of being a landlord for purposes of these proceedings and there was no sale of a business within the meaning of section 63 of the Act.

27. In support of the respondent's position, counsel relied on the following Board cases: *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923; *W. F. Stevens Reproductions Inc.*, [1984] OLRB Rep. Apr. 674; *Caressant Care Nursing Home of Canada Limited*, [1985] OLRB Rep. Jan. 50; *The Charming Hostess Inc.*, [1982] OLRB Rep. Apr. 536.

28. The applicant's request that the Board find that the respondent sold part of its business to the intervener is based on section 63 of the Act. The relevant portions of that section provide:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union ... sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto...

In order for the applicant to establish its entitlement to a declaration that the respondent sold part

of its business to the intervener, it must persuade the Board that the leasing of premises to tenants at 99 Bank Street is a part of its business.

29. In *The Corporation of the City of Stratford, supra*, the Board set out the principles that are applicable in a section 63 application, commencing at page 934, as follows:

25. Section 63 of the Act does not define the term “business” other than by stating that it “includes a part or parts thereof”. Therefore, it is left to the Board to interpret the term “business”, as used in section 63 of the Act, in a way which is sensitive to the purposes of the Act as a whole, and section 63 in particular, but having regard to the almost infinite variety of economic relationships to which the Act applies. The Board recognized that the activity of the entity which is subject to an application under section 63 will affect, to a substantial degree, the significance the Board will ascribe to the various parts of that entity that have been transferred when less than all of it is sold, in assessing whether there has been a sale of part of a business... .

At page 935 in the same decision, the Board went on to say:

26. The Board has previously indicated that the purpose of section 63 of the Act is to provide a much higher degree of stability to a collective bargaining relationship than would otherwise exist if collective agreements or bargaining rights were treated in law in the same way as are commercial contracts or rights created under commercial agreements. Collective agreements and bargaining rights are different. They are accorded significant protection by the *Labour Relations Act*... .

... .

27. Where a vendor sells every element of its business directly to one purchaser who continues the vendor's business, the Board will find that such a transaction constitutes a sale of a business within the meaning of the Act. However, where one purchaser obtains less than all of the elements of the vendor's business, the Board may or may not find a sale of a part of a business, and the Board's determination will ultimately depend on what elements of the predecessor's business were sold to the purchaser... .

... .

Assets are part of a business, as are the services the business provides. A sale of a part of a business within the meaning of the Act does not arise every time a discrete element of that business, such as a single piece of equipment, is sold. Section 63 of the Act is concerned with preserving bargaining rights when there is a disposition of a combination of elements that create employment... .

30. In *The Corporation of the City of Stratford, supra*, the applicant union alleged that the arrangement by the respondent, The Corporation of the City of Stratford, to have the majority of its garbage collection that the City's employees represented by the union had been doing, performed by someone else amounted to a sale of a business pursuant to section 63 of the Act. The award of the contract was made to the successful bidder after tenders were invited. Many of the elements of the contract entered into with the successful bidder and the City are similar to those in the instant case. The employees were hired by the successful contractor and their supervision was carried out by its foreman. Their wage rates and hours of work were determined by the contractor. The Board concluded that the contractor exercised the fundamental control over the working lives and working environment of the employees and noted that the contractor was a pre-existing entity with its own management structure, capital assets, employees, entrepreneurial initiatives and business skills. Further, the Board was satisfied that the City transferred to the contractors the work it no longer wished to perform. The Board found that the contractor was an established employer who had carried on the business of garbage collection for several years, contracted to perform the work for the City. The Board concluded that there was a transfer of work from the City to the contractor, but not a transfer of a part of the City's business to the contractor.

31. In *Metropolitan Parking Ltd.*, [1979] OLRB Rep. Dec. 1193, the Board considered the various ways in which one employer could arrange its affairs so that another employer could perform the work that had been previously performed by the first employer. At page 1210-1211, as to the application of section 55 (now section 63), the Board stated as follows:

37. The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. *Work or services performed by A's employees within A's own organization are 'contracted out' to B, and B uses his own managerial skills, plant, equipment and 'know how' to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business.* If it is clear on the evidence, however, that B is unable to fulfill A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of 'part of a business') or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4).) If, however, 'but for' the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business - albeit a part which A no longer wishes to operate itself.

38. Similar considerations apply where A, for his own business reasons, chooses to change subcontractors and purchase his requirements elsewhere. Here also there would be a continuation of the work performed, and the new subcontractor may find itself in the same position of economic interdependence vis-a-vis A as a previous subcontractor. Again, these factors do not, in themselves, determine the applicability of section 55. Essentially the matter remains one of characterization. Is the transfer, if any, from the predecessor merely incidental, or is it integral, to the successor's ability to produce the goods or supply the services formerly produced by the predecessor? Has the successor acquired all, or a coherent and severable part, of the predecessor's economic organization? And to repeat the words of Widjery, J. in *Kenmir*, *supra*, has the transaction put the successor in possession of a going concern, the activities of which he could then carry on without interruption? A transfer of work, by itself, is simply not enough to ground a section 55 finding.

[emphasis added]

32. In our view, an analogy can readily be drawn between the fact situation in the *Corporation of the City of Stratford*, *supra*, and the case presently before the Board. We find that a similar analogy can also be drawn between the instant case and the *Complete Car Care Centre*, *supra*. We would add that the fact situation in the *Toronto College Street Centre Limited*, *supra*, is distinguishable from that in the instant case.

33. In the result, on the evidence we do not find that the contracting out arrangement here was anything less than a *bona fide* or true contracting out arrangement of the cleaning services at 99 Bank Street in Ottawa. See, *Caressant Care Nursing Home of Canada*, [1985] OLRB Rep. Jan. 50.

34. Accordingly, there has not been a sale of a business within the meaning of section 63 of the Act.

2241-86-R The Society of Ontario Hydro Professional and Administrative Employees, Applicant v. **Ontario Hydro**, Respondent v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, Intervener v. Groups of Employees, Objectors

Bargaining Rights - Certification - Pre-Hearing Vote - Applicant requesting pre-hearing vote - Applicant and respondent have been parties to "agreements" which speak to terms of employment - If applicant already has bargaining rights for employees in unit for which it seeks certification, no outcome of a vote would change those rights - Hearing scheduled so that applicant can show cause why its request for a vote should not be refused

BEFORE: Owen V. Gray, Vice-Chair, and Board Members G. O. Shamanski and B. L. Armstrong.

DECISION OF THE BOARD; March 17, 1987

1. This is an application for certification in which the applicant has requested that the Board conduct a pre-hearing representation vote. Under subsection 9(2) of the *Labour Relations Act* ("the Act"), the Board may (and ordinarily does) conduct such a vote when asked to do so, if there is the prerequisite appearance of membership support in a voting constituency selected by the Board. This appears to be one of those extraordinary cases in which the Board should not direct a pre-hearing representation vote.

2. The unit for which the applicant seeks certification consists of what the respondent would describe as "administrative, scientific and professional engineering employees". There is a dispute about whether "professional engineers" should form a separate unit and about how the determination of their wishes in that regard is to be made as required by subsection 6(4) of the Act. There are disputes about the inclusion or exclusion of other job categories by reason of their community of interest with other affected employees and about the application of clause 1(3)(a) of the Act, which is challenged by the applicant as contrary to the *Charter of Rights*. The applicant and respondent disagree about whether clause 1(3)(b) of the Act results in the exclusion from any appropriate unit or units of approximately 3,000 of the nearly 7,000 persons for whom the applicant seeks certification.

3. If the union has the requisite appearance of support within such a constituency, as the applicant does in this case, the Board's ordinary response when there is a dispute over the composition of the appropriate bargaining unit is to strike a voting constituency which contains everyone who might later be found to fall within the appropriate bargaining unit and to segregate the ballots cast by any of those in that constituency who might not later be found to be in the appropriate unit: see *Carleton Roman Catholic Separate School Board*, [1986] OLRB Rep. Sept. 1200, at paragraph 8. In some cases, the number of persons whose ballots would be segregated is sufficiently great that it is administratively simpler and safer to segregate all ballots. That is what would be done here if we were to direct that a pre-hearing representation vote be conducted.

4. By themselves, the complexity of the bargaining unit issues in this case and the resulting complexity of any pre-hearing representation vote would not, we think, be sufficient reason to refuse the applicant's request that a pre-hearing representation vote be conducted, nor would the very considerable cost to the Board of conducting such a vote. The fact that the applicant has not previously been found to be a trade union does not warrant refusal of the request, for reasons set out in *Emery Industries Limited*, [1980] OLRB Rep. March 316. For similar reasons, we would not have

thought a refusal would be warranted by the mere allegation that the applicant has been the recipient of employer support and, therefore, uncertifiable by virtue of section 13 of the Act.

5. It is common ground that for many years the applicant and its predecessors or precursors have been party to "agreements" with the respondent which speak to the terms or conditions of employment of persons in the unit for which the applicant seeks certification. These agreements describe the applicant as "the representative body" for these persons, at least some of whom are conceded to be employees to whom the *Labour Relations Act* can apply. The respondent has expressed one of its several grounds for opposition to the request for a pre-hearing representation vote in these terms:

A prime factor causing the Board to exercise its discretion in ordering a vote prior to a hearing is not present in this Application. Usually the Labour Relations Board is concerned that delay in the Applicant (the Society) being able to exercise representational rights on behalf of employees will cause disinterest in and loss of support for an applicant trade union. Under the Society's current relationship with Ontario Hydro, *Ontario Hydro is prepared to permit the Society to continue to exercise its representational role in both negotiations of employment conditions and administration of policies and procedures including access to grievance and arbitration procedure.* Negotiations have been continuing for 1987 compensation improvement and a Mediator's Recommendations on Benefits received January 22nd, 1987, have been accepted by both parties. Salary determination, if unable to be agreed upon in direct negotiations, will be presented at Arbitration and an Award expected by March 10 will be final and binding for this year. *In all of the Board jurisprudence on this issue, this unique circumstance of a voluntarily recognized organization continuing to exercise its role in negotiations and related functions has never been considered nor ruled on by the Board.*

[emphasis added]

The respondent and the objecting employees both allege that the past and existing agreements between the applicant and respondent constitute employer support of the applicant which would disentitle it to certification by virtue of section 13 of the Act even if the applicant is a trade union as defined by clause 1(1)(p) of the Act, which they deny. The applicant claims that it is a certifiable trade union, and that its agreements with the respondent have been and are collective agreements within the meaning of the *Labour Relations Act*. The respondent denies that the agreements are collective agreements.

6. If the Board finds that the applicant is a certifiable trade union and if its current agreement with the respondent is a collective agreement, it appears it would follow that the applicant already has bargaining rights for employees in the unit for which it seeks certification, and no outcome of this application - and, hence, no outcome of a vote - could augment or diminish those existing bargaining rights. If, on the other hand, the applicant is not a certifiable trade union, then it can have no existing rights which are enforceable under the *Labour Relations Act* and no outcome of a vote could result in its having such rights. Unless the Board were to find that an employer and a union can contract out of the application to them of the *Labour Relations Act* and, further, that these parties actually did so without the applicant's thereby or thereafter having become uncertifiable, we have difficulty seeing how the applicant could be found to be a certifiable trade union without its existing agreement with the respondent being a collective agreement. While we have come to no firm conclusion on these points, we are led to wonder whether there is any possibility of an outcome of this application in which the results of a pre-hearing representation vote could have a meaningful part to play in the determination of the applicant's right to represent the employees affected by this application. We therefore doubt that we should grant the applicant's request that a pre-hearing vote be conducted.

7. A decision about whether and how to conduct a pre-hearing representation vote is a

procedural decision; it does not determine the substantive rights of any person affected by the application. Because the object of a pre-hearing representation vote is the expeditious determination of employee wishes, this decision is ordinarily made on the basis of the material filed by the parties and a Labour Relations Officer's report on the records of the applicant and respondent and on the positions taken and representations made by the parties' representatives at a meeting he or she will have held for that purpose very shortly after the application was filed. The premise of the pre-hearing vote procedure is that there can be substantial prejudice to an applicant if the determination of employee wishes is delayed. Accordingly, when the Board is inclined by the material before it to refuse a request for a pre-hearing representation vote despite the appearance of the requisite membership support in a suitable voting constituency, the Board schedules a hearing so that the applicant can have the opportunity to address the Board's concerns and show cause why its request should not be refused: *A.G. Simpson Co. Limited*, [1985] OLRB Rep. Sept. 1341; and see *Ontario Hydro*, [1980] OLRB Rep. June 882.

8. Accordingly, we direct that a hearing be scheduled for March 27, 1987 for that purpose and for the purpose of determining the manner in which the hearing of the substantive issues in this application will proceed.

3128-86-R Pebra Peterborough Employees Association, Applicant v. **Pebra Peterborough Inc.**, Respondent v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), Intervener

Certification - Practice and Procedure - Respondent asserting that intervention lacked particulars - Board reviewing its policy respecting sufficiency of particulars - Further particulars ordered

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. Wilson*.

APPEARANCES: *Robert R. Reid*, *Linda Barry-Hollowell*, *Don McLean*, *Darlene Van Volkenburg*, *Heather Hamilton* and *Sandra Rutherford* for the applicant; *D. I. Wakely*, *M. Fails*, *E. Jiskoot* and *D. MacDonald* for the respondent; *L. A. MacLean* and *Maureen Kirincic* for the intervener.

DECISION OF THE BOARD; March 31, 1987

1. This application for certification came on for hearing in Toronto on March 6, 1987. At the request of the intervener, the Board made an order excluding witnesses, excepting one adviser of each party. Applicant's counsel indicated that Mr. Don MacLean would be his adviser, respondent's counsel retained Mr. D. MacDonald as his adviser, and Joanne Meed remained in the room as adviser to counsel for the intervener.

2. The Board then dealt with, as a preliminary matter, the respondent's assertions that the intervention filed by the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) lacked particulars. By letter dated March 3, 1987, counsel for the respondent demanded specified particulars of certain of the allegations contained in Schedule "A" to the intervention. Counsel for the intervener responded in two letters, both dated March 5, 1987, and orally on the morning of the hearing. Counsel for the respondent was not satisfied

with these responses and asked that the Board either strike out the allegations or direct that further particulars be provided. We now reiterate the ruling made orally at the hearing.

3. Both Rule 72 of the Board's Rules of Procedure and Section 8 of the *Statutory Powers Procedure Act* require that particulars of allegations of misconduct be given in a timely manner to the party which is alleged to have acted improperly. This requirement is based on both legal and labour relations considerations. The legal consideration is a recognition of the rule of natural justice that a party against whom the allegations of wrongdoing are made must have sufficient notice of them to enable it to know and prepare for the case that it must meet. The labour relations consideration is that there be no prejudicial delay in the proceedings (see *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141). Where an allegation made in any document filed with the Board is not sufficiently particularized, the Board may, when requested, either strike out that allegation or direct that further particulars be provided. Further, evidence of facts or circumstances that have not been included or sufficiently particularized in a document filed with the Board may not be adduced at the hearing of the matter to which they relate except with consent of the Board and then only upon such terms as the Board considers appropriate.

4. On the other hand, the Board's approach to "pleading" is more lenient than that of the courts. Consequently, the Board will not usually strike out an allegation unless it is so lacking in particulars or so untimely that the party whose conduct is being complained of is so prejudiced that the allegation cannot properly be entertained in light of the legal and labour relations foundation for the requirement of particulars. In the Board's view it was not appropriate to strike out any of the allegations in the intervention or subsequent correspondence. However, we did agree that further particulars were required.

5. In considering the sufficiency of allegations, the Board considers whether or not they substantially identify the offences alleged and the acts or omissions complained of; whether the information requested is really required by the party requesting it; the knowledge or availability of knowledge possessed by the parties of the alleged improprieties; whether what is being requested is really evidence rather than particulars (though particulars may reveal evidence or names of witnesses); the apparent purpose for the demand for particulars; and, the general nature and circumstances of the improprieties alleged. Having regard to those considerations, to the material before us, and the representations of the parties, we directed that the intervener provide particulars to Schedule "A" of its intervention as follows:

- (a) the name of the employee, if known, and the dates, approximate times, and places of the meetings referred to in paragraphs 10 and 11; and
- (b) the date, approximate time, and place of the meeting referred to in paragraph 12; and
- (c) with respect to paragraphs 17 and 19, the dates that it is alleged that Mr. MacLean and his three associates (as named in the intervener's response to the demand for particulars) were authorized entry to the respondent's plant at a time during which they were not scheduled to work and the purpose for which it is alleged such entry was granted or gained; and
- (d) the date, the approximate time, the place, and the name of the employee to whom it is alleged Mr. MacLean made the comment attributed to him in paragraph 21.

6. We further stated that the intervener is free to further particularize its allegations if it sees fit to do so, and that the intervener will be strictly held and limited to those allegations which it properly particularizes. In response to a concern expressed by counsel for the respondent, we stated that we had not ruled either that the intervener could make new allegations of improper conduct or that it could not do so, but that any such issue is properly dealt with by the panel hearing the application.

7. The intervener was also directed to deliver to the applicant and the respondent, and to file with the Board, an amended Schedule "A" which incorporates, and indicates by underlining, both the particulars already given and to be given by March 25, 1987.

8. The matter was then adjourned and, in consultation with the parties, the Board scheduled the hearing of this application on its merits to commence on April 1, 1987 and to continue on April 2, and 21, 1987 in its Board Room, 6th Floor, 400 University Avenue, Toronto, Ontario, M7A 1V4 at 9:30 a.m.

9. This panel is not seized.

2209-86-R Ontario Nurses' Association, Applicant v. Porcupine General Hospital, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Union requesting that standard language of "employed in a nursing capacity" be deleted from bargaining unit description - Union seeking to invoke craft unit provision of Act for this purpose - Nurses a craft only when confined to historical bargaining unit description of "in a nursing capacity" - Board refusing to eliminate standard language - Certificate issuing

BEFORE: *M. G. Mitchnick*, Vice-Chair, and Board Members *J. Rundle* and *J. Sarra*.

APPEARANCES: *Mary Hodder, Carolyn Prepp, Marion Perrin, and Maureen O'Halloran* for the applicant; *Allan Shakes, Malcolm Winter, Vi Douglas and Bryan Bennetts* for the respondent; *Terry Wyburn and Margaret McGinn* for the objectors.

DECISION OF VICE-CHAIRMAN M. G. MITCHNICK; February 27, 1987

1. This is an application for certification in which the Board is asked to apply the provisions of section 6(3) of the Act.

2. The applicant, the Ontario Nurses' Association, ("ONA") asks the Board in this case to alter its normal bargaining unit description of "all registered and graduate nurses employed in a nursing capacity" by deleting the qualifying words "employed in a nursing capacity". The representatives for ONA explain that those words have, over the years, involved the Union in costly and time-consuming litigation (with varying success) over the inclusion or exclusion of such classifications as Resident Care Co-ordinator, Co-ordinator in Home Care/Patient Care Referral, Nurse Clinicians, Pre-natal Instructor and In-service Co-ordinator, Infection Control Co-ordinator, to name a few. At the present hospital the positions of Admissions/Discharge Co-ordinator and Pharmacy Materials Manager are currently being filled by Registered Nurses, whom the respondent

submits are not in fact employed in a “nursing capacity”, and would not form part of the bargaining unit being certified. The applicant recognizes that it will always be required to litigate from time to time the question of whether certain persons in dispute exercise “managerial functions” or are “employed in a confidential capacity in matters relating to labour relations”, but submits that these tests are adequate to protect the interests of the employer, and that these ought to be the *only* tests for exclusion from their bargaining unit.

3. The Board understands the problem, from the applicant’s point of view. Any definition in a bargaining unit description will always carry with it a potential for litigation, and in this case the incidence of such litigation has been relatively high. The difficulty here, however, is that the applicant seeks to invoke the provisions of section 6(3) of the Act to eliminate the problem, and those provisions are simply not available to it in the present circumstances. Section 6(3) provides:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

That section creates an exception to the normal unfettered discretion of the Board (in section 6(1)) to determine what it considers in a given case to be an “appropriate” bargaining unit. It does so solely on the basis of *collective-bargaining history*, however, and the unit that an applicant trade union is thereby entitled to demand is the unit that that collective-bargaining history has itself established.

4. On the evidence placed before us, we have no problem with the argument that the particular group of employees ONA has historically represented are, in the words of section 6(3), “employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts”, and that ONA is itself “a trade union pertaining to such skills or crafts”. ONA’s bargaining history does not show, in other words, the kind of “mixed-unit” problem adverted to by the Board in such cases as *Essex Health Association*, [1967] OLRB Rep. Nov. 716 and *Waterloo County Health Unit*, [1969] OLRB Rep. Jan. 1016. But falling within that section still only assists ONA to the extent of its own traditional bargaining unit. And, as the respondent points out, the “skills” by virtue of which ONA’s members have always been set apart in their own bargaining unit have been defined by reference to nurses “employed in a nursing capacity”.

5. The best elaboration by the Board of this limitation on the effect of section 6(3) is found in the case of *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481. At paragraph 57, in particular, the Board observed:

Nor are the protections offered by section 6(3) absolute. An examination of the statutory language indicates that it has been carefully drafted to preserve the status quo. It is a recognition of historical organizing patterns, rather than any general endorsement of craft bargaining units. Those historical criteria are built right into the section itself, and must be satisfied before it has any application. Section 6(3) is available only *if* the group of employees whom the union seeks to represent *already commonly* bargains separately and apart from other employees; and only *if* the applicant trade union has traditionally represented employees with those skills. Both conditions require the Board to look to the collective bargaining system for historical precedent to establish that the separate bargaining is already “common”, and that the union’s representation

of these employees is in accordance with “established practice”. These conditions effectively preclude the development of new craft unions and, in our view, *limit the extension of craft bargaining patterns beyond their traditional boundaries...*

[latter emphasis added]

There the International Brotherhood of Electrical Workers was seeking to require the Board to grant it in the *mining* industry a unit composed solely of electricians, on the basis of the traditional bargaining unit description it enjoyed in the *construction* industry. The Board, in refusing to carry that description over from one industry to another, pointed out that the historical requirement for having “commonly” bargained on the basis of a particular unit is very specific to the terms of the unit historically bargained for. At paragraph 62 the Board dealt with this point as follows:

... Likewise, to determine the intended meaning of “common” in section 6(3) (i.e. to assess how common a union’s bargaining practice actually is) one must necessarily delimit a field of bargaining behaviour against which the situation of the employees in question can be tested. To do that, it is helpful to refer to the purpose of section 6(3), for as we have noted, section 6(3) was intended to preserve rather than extend craft representation rights. It was meant to protect craft rights where they were already commonly established. At the very least, this requires the union to show that it commonly bargains for electricians like these separately and apart from other employees in the industry in which the certification application is made, or related industries; or, alternatively, that it commonly bargains separately and apart for electricians *like these* in the collective bargaining system as a whole, even if not in the particular industry in question. These are the reference points which appear to us to be most consistent with the thrust and terms of the section.

[emphasis again added]

The applicant’s argument on the basis of section 6(3) of the Act does not, therefore, assist it in eliminating the words “employed in a nursing capacity” from the description of the bargaining unit, and those words will continue to be adopted by the Board in the case now before us.

6. The only persons in dispute in this case, however, being those in the positions of Co-ordinator and Pharmacy Materials Manager, are now agreed by letter dated February 19, 1987 to be excluded from the bargaining unit in any event.

7. On the basis of the foregoing, the Board hereby confirms its description of bargaining unit #2 as set out in paragraph 4 of its interim decision of December 8, 1986.

8. With respect to the “full-time” bargaining unit (bargaining unit #1), the Board ascertains that, taking into account the applicant’s letter of February 19, 1987, there were 20 employees employed in that bargaining unit as of the date the application was filed. The applicant filed membership evidence on behalf of 15 of the employees in that unit. There were also filed with the Board by the terminal date statements from employees indicating their opposition to being represented by the applicant. The number of employees’ names on such statements overlapping with the names of employees who signed membership cards in the applicant, however, is not sufficient to reduce the level of unqualified membership evidence below the 55 percent required for outright certification.

9. The Board accordingly certifies the applicant as exclusive bargaining agent for all registered and graduate nurses employed in a nursing capacity by the respondent at South Porcupine, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week.

10. A certificate will now issue to the applicant with respect to both bargaining units #1 and #2.

DECISION OF BOARD MEMBER JANIS SARRA;

1. I concur with the decision of the Vice-Chair. I intend in this decision only to comment further on “nursing capacity”.
2. The Board has no problem accepting the argument that the ONA is a trade union pertaining to craft and that the particular group of employees the ONA has historically represented are members of a craft, but it quite correctly confines this to the historical bargaining unit description of “in a nursing capacity”. This is consistent with the requirements of section 6(3) of the Ontario *Labour Relations Act* as articulated in *Art Wire and Iron Ltd., et al.*, 54 CLLC ¶17,080.
3. All parties to this application made submissions with respect to the issue of “nursing capacity”. Given the importance of these submissions, it is both useful and necessary to provide a synthesis of the Board’s jurisprudence with respect to “nursing capacity” as a bargaining unit description.
4. One of the reasons, but not the only reason that the ONA sought a craft bargaining unit in this application was to avoid the continuing litigation the union faces with respect to the definition of “nursing capacity”. The Board has both the jurisdiction and responsibility to clarify its understanding of “nursing capacity” at the front end of the certification process with a view to foreclosing future problems, minimizing litigation, and with a view to fulfilling its mandate to foster healthy labour relations.
5. The Board’s understanding of the concept of nursing capacity has matured and evolved. Fifteen years ago there were few, if any, nursing specialties. New job titles such as “discharge nurse” and “prenatal nurse” reflect the increasing specialization of nurses in response to the increasing complexity of health care service delivery. The term “nursing capacity” has evolved to encompass those jobs because they have historically been and continue to belong to nursing as a set of skills and indeed as a craft.
6. The Board has recognized that the work of nurses includes a range of skills and activities which are directed to prevention of illness and health education in addition to “hands on” patient care. In *ONA v. Oakwood Park Lodge*, 82 CLLC ¶16,153, the Board quotes from the Standards of Nursing Practice issued by the Ontario College of Nurses pursuant to its authority under *The Health Disciplines Act*, RSO 1980: in the context of considering the range of activities and supervisory functions inherent in nurses work:

The Registered Nurse performs acts requiring substantial specialized knowledge, skill and judgement, in assessing health needs, and in planning, implementing and evaluating nursing care. These include health education, promotion and maintenance of health, prevention of illness or injury, early case finding, rehabilitation and implementation of the prescribed medical regime. These acts are supportive and restorative to the health and well being of individuals, families and communities.
7. The Board has in the past explicitly considered the meaning of “nursing capacity” as the bargaining unit description. In *ONA v. Victorian Order of Nurses*, [1984] OLRB Rep. Feb. 395, the Board held that community co-ordinator/case managers were employed in a nursing capacity though they were not performing “hands on” patient care duties. In its unanimous decision the Board adopted the broad interpretation of “nursing capacity”:

Their primary role is to assess and monitor the needs of patients referred to the programme by a physician and help co-ordinate the delivery of services (be they from the health care professionals or other community agencies) to meet those patient needs. This is a professional judgement of health needs made in conjunction with other health care professionals...

Nor do we accept the respondent's submission that the community co-ordinator/case managers are not employed "in a nursing capacity", even though they do not personally do "hands on" patient care...

Moreover, the testimony of the co-ordinator who gave evidence indicates that she does in fact rely upon her nursing background and experience in carrying out her duties. She interacts with other members of the health care team and with physicians, exercising their diagnostic skills and professional judgement of a nurse.

8. Every registered nurse in Ontario must qualify for and have a valid nursing certificate. Every nurse operating in a health care capacity is subject to the regulations and discipline of the Ontario College of Nurses established by law through *The Health Disciplines Act*. No nurse working in the health care sector, whether in a "hands on" capacity in the narrowest sense or in pre-natal education, supply services, pharmaceutical services or discharge planning is working without that certification or that accountability. Any nurse in breach of procedure or public health practice such as poor sceptic practices in the handling of materials, could suffer a misconduct charge, revocation of her/his license and ultimately discharge. This reinforces the proposition that all these nurses are employed "in a nursing capacity".

9. The issue of the appropriate interpretation of the "nursing capacity" phrase where one position is held sometimes by a nurse and sometimes by a non-nurse has also been raised and addressed by the Board. In *ONA v. Victorian Order of Nurses, supra*, at page 398 the Board wrote:

It may be that there is no regulatory requirement to have a nurse in this position and at some time in the past and early phases of the home care programme there was a co-ordinator who was not a registered nurse but a physical and occupational therapist. But that does not mean that those who are registered nurses and using their skills as such are not employed in a nursing capacity. *It means only that the professional skills exercised by various health care professionals are not enclosed in watertight compartments, and that if the respondent were once again to hire a co-ordinator who was not a registered nurse, that individual would fall outside the nurse's bargaining unit.*

[emphasis added]

10. The Board's approach in this decision protects the employer right to hire, the accessibility of other workers to jobs and the right of other bargaining agents to claim representation of non-nurses when they hold these jobs.

11. The broad interpretation of the bargaining unit description "employed in a nursing capacity" which has been set out by the Board should not engender any conflict in community of interest, as exclusions from the bargaining unit based upon the Board's "managerial" and "confidential capacity" tests will continue to apply.

12. This brief review of Board jurisprudence illustrates the broad interpretation the Board has given to "nursing capacity". It is incumbent upon us to continue to clarify this term at the outset of the certification process to minimize problems and in order to facilitate and expedite the establishment of a healthy collective bargaining relationship between the parties.

DECISION OF BOARD MEMBER J. RUNDLE;

1. With respect to the decision of Vice-Chair Mitchnick I concur and would only add that the current designation "employed in a nursing capacity" is appropriate and necessary to deal with community of interest tests in cases involving claims by other unions of representation rights.
2. In response to the decision of Board Member Sarra, I feel it appropriate to make the following comments.
3. The sole issue before this panel was the O.N.A.'s request pursuant to section 6(3) of the Act that its normal bargaining unit description be altered by deleting the qualifying words "employed in a nursing capacity". As our decision properly holds, section 6(3) does not assist the applicant. That section provides that the Board can determine that a craft unit is appropriate only where that unit has historically bargained separately. Therefore there is no statutory authority for extending an existing craft unit, which is what the applicant seeks.
4. Furthermore, section 6(3) requires that employees in a craft unit exercise technical skills by which they are distinguishable from other employees. The technical skills by which nurses have been distinguished have historically been defined by reference to the concept of "employed in a nursing capacity". To delete that qualification from the bargaining unit description might dilute the technical skills exercised by the members of the unit to the point that its status as a craft unit could be jeopardized.
5. The decision of Board member Sarra describes the evolution through Board jurisprudence of a broad definition of "employed in a nursing capacity", and in so doing makes a number of statements to which I would not subscribe. However, the Board heard no evidence or argument with respect to this issue, and in my opinion, ought to make no ruling on it.

1388-86-R Labourers' International Union of North America, Local 527, Applicant v. **Stacey Electric Company Limited**, Respondent v. The I.B.E.W. Construction Council of Ontario and the International Brotherhood of Electrical Workers, Local 586, Interveners

Certification - Construction Industry - Applicant seeking to be certified to represent construction labourers installing highway lighting - Respondent and interveners contending that employees already covered by "line work agreement" - Whether applicant had established bargaining rights in area at the time the line work agreement was entered into - Employees found to already be covered by line work agreement - Contention that challenge to application is in the nature of a work jurisdiction claim and as such should not be decided in the context of a certification application dismissed - Application dismissed

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *J. Murray* and *J. Redshaw*.

APPEARANCES: *David Strang* and *John Colacci* for the applicant; *Frank Hudson* for the respondent; *Paul Timmins* and *Ralph Tersigni* for the interveners.

DECISION OF THE BOARD; March 13, 1987

1. The name of the respondent is amended to read: "Stacey Electric Company Limited".
2. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.
3. The respondent is an electrical contractor based in Metropolitan Toronto. It is primarily engaged in the installation of street and highway lighting as well as traffic lights. Approximately 75 per cent of its work is in the Toronto area. Jobs outside this area are generally relatively small, and are performed by one or two employees sent out from Toronto. At the time of the filing of the instant application, however, the company was engaged in a relatively major job in Ottawa, installing highway lighting on the Queensway. There were 10 employees on the job. Seven of these were employees of the respondent from Toronto. The other 3 were hired locally. Two of those hired in Ottawa were members of the applicant trade union. On the basis of membership evidence relating to these two individuals, the applicant seeks to be certified to represent construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell. The respondent and the interveners oppose the application, contending that the two employees were already covered by what amounts to an "all employee" collective agreement.
4. The collective agreement in question, which is generally referred to as the "line work agreement", is between the Electrical Contractors Association of Ontario, of which the respondent is a member, and the I.B.E.W. Construction Council of Ontario, which is comprised of the Ontario locals of the International Brotherhood of Electrical Workers (the "IBEW"). The agreement expressly excludes from its scope employees engaged in the industrial, commercial and institutional sector of the construction industry, (the "ICI sector"). The recognition clause in the agreement provides as follows:

500. Union Recognition - The Contractor recognizes the Union as the sole bargaining agent for all Foremen, Journeyman Linemen-Spicers, Apprentice Linemen-Spicers, Groundman/Equipment Operators, Groundman/Drivers, Groundmen, Utility Men and Foresters performing work within the acknowledged jurisdiction of the Union and similarly the Union recognizes the Contractor as the sole bargaining agent.

The qualifications and work of the various classifications mentioned in the recognition clause are discussed as follows in Articles 600 and 601:

600. Employee Classifications - (a) Employees shall be divided into the following classes:

Journeyman Lineman - Splicer

Groundman/Equipment Operator - 1st, 2nd, 3rd year

Groundman Driver - 1st and 2nd year

Groundman - 1st and 2nd year

Utilityman - 1st and 2nd year

Forester

Apprentices - 1st to 4th periods.

(b) Any classification of employee may be required to perform the work of a lesser qualified workman providing that his wage rate is maintained.

601. Employee Qualifications

(a) **Journeyman Lineman - Splicer** - A lineman who is fully qualified to work in all facets of the trade including energized circuits and who has successfully completed a recognized training course; and is qualified to undertake the installation, jointing, splicing, testing, bonding, racking and repairing of all types of high voltage electrical cables; the fitting of potheads and other accessories to cables; and the assembly, testing, repair and maintenance of such accessories.

(b) **Groundman/Equipment Operator** - A workman qualified to operate mechanical equipment including (but without limiting generality) digging machines, track vehicles, cranes, drills, jack-hammers, stationary winches, tractor trailers, regular linetrucks, trailers and back-hoes. He shall be required to undertake minor mechanical repairs and adjustments and daily maintenance to ensure proper operation of equipment and if required by the Employer he shall provide satisfactory evidence of competence in the operation of equipment provided by the Employer.

(c) **Groundman/Driver** - A workman qualified to drive mechanically-propelled vehicles and whose duties shall include the operation of booms mounted on mobile vehicles and shall also include the transporting of transmission line materials from assembly site to erection site.

(d) **Groundman** - A workman whose duties shall include assisting linemen and other workmen; the requisitioning, handling and transporting of materials; the dressing of poles and the assembling of towers and structures on the ground; but who shall not be required to make contact with a conductor which is or may become energized during a job.

(e) **Utilityman** - A workman whose duties shall include (but not be limited to) civil work, the cutting of brush and the digging of holes and ditches.

(f) **Forester** - Must be knowledgeable in tree removal, tree-trimming techniques, selective cutting, selective spraying, restoration practices and landscaping. Have a good knowledge of the Chemicals related to vegetation and pest control. Must be capable of obtaining Land Extermination Licenses for insecticide and herbicide application work. Must have a working knowledge of the mechanical aspects of the equipment with which he works in order to carry out routine maintenance and to facilitate minor repairs. Must be qualified to operate such vehicles as are required to perform the work in this classification.

5. Appendix "A" to the collective agreement is a schedule of wage rates for journeymen in different parts of the Province, including Ottawa. Article 900 of the collective agreement, which is set out below, establishes a formula by which other classifications are to be paid:

900. Regular Pay - (a) The hourly rates of pay shall be as follows:

Date	Classification	Base Rate	VP& SHP	Union Funds	Wage Pack.	Assoc. Funds
Journeyman Lineman-Splicer See Appendix for rates						
Apprentice:	1st Period	50% of the applicable journeyman rate				
	2nd Period	60% of the applicable journeyman rate				
	3rd Period	70% of the applicable journeyman rate				
	4th Period	80% of the applicable journeyman rate				
Groundman	1st Year	60% of the applicable journeyman rate				
Equipment Operator	2nd Year	70% of the applicable journeyman rate				
	3rd Year	80% of the applicable journeyman rate				
Groundman	1st Year	50% of the applicable journeyman rate				
Driver	2nd Year	60% of the applicable journeyman rate				
Groundman	1st Year	50% of the applicable journeyman rate				
	2nd Year	60% of the applicable journeyman rate				
Utilityman	1st Year	40% of the applicable journeyman rate				
	2nd Year	50% of the applicable journeyman rate				
Forester		60% of the applicable journeyman rate				

(b) Groundmen, Utilitymen and Foresters who are presently being paid in excess of the above rates shall have their rates red-circled.

6. The hiring of employees, and the ability to move employees outside a firm's "home area", are covered by the following provisions of the agreement:

700. Hiring - The Contractor agrees to hire and employ only members of the International Brotherhood of Electrical Workers on all Linework in his home area. All hiring will be done through the Local Union Office and no one will be employed unless they are in possession of a clearance card from the Local Union office.

701. Working Card - if the Local Union is unable to furnish certified workmen to the Contractor within three working days of the time the Union Office receives the request for men (excepting Saturdays, Sundays and Holidays) the Contractor shall be afforded the right to employ certified workmen as are available. The Local Union will issue clearance cards to workmen hired in these circumstances who may be replaced by certified workmen after three working days notice to the Contractor, but in no case until a workman has worked a minimum of one week.

702. Mobility - It is further agreed that should a contractor obtain work in any area outside of his home area, he shall be permitted to bring in his own crews comprised of linemen, splicers and other specialists and hire any additional men required through the union.

In his home area, the contractor may continue to use his forces to perform any type of work described above and augment his forces where necessary from the union.

When a contractor obtains work outside of his home area, Local Union No. 353 shall act as a clearing house for the Province of Ontario by coordinating manpower requirements and making workmen available to Contractors for the whole Province.

7. Mr. Ralph Tersigni, the Executive Secretary of the IBEW Construction Council of Ontario, testified that prior to the advent of the legislatively mandated scheme of provincial bargaining in the ICI sector, the practice was for the various IBEW locals to each negotiate a collective agreement covering both ICI and non-ICI work, including line work. With the advent of province-wide bargaining in the ICI sector, however, the need was recognized to deal separately with the non-ICI sectors. Both the IBEW Construction Council of Ontario and the Electrical Contrac-

tors Association of Ontario agreed to do so by way of a province-wide agreement containing the scope clause set out above. According to Mr. Tersigni, an important factor in determining the wording of the scope clause was the fact that certain other unions, most notably Local 183 of the Labourers International Union of North America ("Labourers Local 183") had acquired bargaining rights for certain non-journeymen employed by contractors engaged in the installation of street and highway lighting and traffic lights. Mr. Tersigni testified that negotiations for the initial line work agreement commenced in 1978, but were not finalized until 1982. The agreement was renewed in 1984 and again in 1986.

8. As indicated above, prior to the execution of the initial line work agreement, Labourers Local 183 had acquired bargaining rights for employees of certain of the contractors engaged in the installation of lighting and traffic lights. Mr. Tersigni's evidence indicates that these contractors remain bound to collective agreements with Labourers Local 183, but contractors not bound to such agreements apply the line work agreement to all of their employees.

9. Labourers Local 183 was certified to represent construction labourers in the employ of the respondent in the Toronto area on August 9, 1976, six years prior to the signing of the first line work agreement. Mr. Frank Hudson, the President of the respondent, testified that since that time successive collective agreements with Labourers Local 183 have been applied only to employees of the respondent performing trenching and concrete work in the Toronto area. Mr. Hudson's evidence indicates that subsequent to the signing of the first line work agreement, the respondent continued to apply agreements with Labourers Local 183 to employees doing trenching and concrete work in the Toronto area, but generally applied the line work agreement to all of its employees elsewhere in the province. While the respondent's general practice has been not to send members of Local 183 out of the Toronto area, one long-term Local 183 member was sent to Ottawa for a short while and paid pursuant to the Local 183 collective agreement. The individual in question was apparently no longer employed in Ottawa when the instant application for certification was filed.

10. As already indicated, at the time of the certification application the respondent employed ten men in Ottawa, three of whom were hired locally. Article 702 of the line work agreement provides that outside of its "home area" a contractor can utilize existing specialist employees but must hire additional men through the union, with IBEW Local 353, the Toronto local, coordinating manpower requirements. Local employees are actually referred to a job site by the IBEW local with jurisdiction in the area. According to Mr. Hudson, the Ottawa IBEW local could not provide local men to the job and accordingly the company directly hired three individuals in Ottawa. The respondent asked the three to fill in forms provided by IBEW Local 353, which the respondent then forwarded to that Local. The respondent paid the "welfare package" specified for by the line work agreement for the three men. Surprisingly, no evidence was led concerning the tasks performed by the three individuals in question or how they were classified by the respondent. Mr. Hudson did testify that they were paid above the rate required by the line work agreement for Ottawa. Mr. Hudson added, however, that the respondent regards the line work agreement rates as minimums only, and that it has paid other employees above those rates.

11. As noted above, two of the three men hired in Ottawa belonged to the applicant trade union. The applicant does not challenge the propriety of the line work agreement, but does submit that it does not cover construction labourers. While no evidence was led concerning the tasks performed by the applicant's members or how they were classified by the respondent, given that they generally work as labourers, as well as the type of work being performed at the job site, it is reasonable to assume that their duties involved one or more of the following tasks, namely assisting more skilled employees, material handling and trenching work. All of these tasks are covered by

the classifications of “groundman” and “utilityman” described in Article 601 of the line work agreement. The recognition clause in the agreement expressly includes both of these classifications. Accordingly, it would appear that the individuals in question were covered by the scope of the line work agreement.

12. The recognition clause in the line work agreement encompasses the classifications listed therein, when “performing work within the acknowledged jurisdiction of the union”. Counsel for the applicant contends that this restricts the unit to employees performing work within the acknowledged jurisdiction of the IBEW. No direct evidence was led, however, as to what is the acknowledged jurisdiction of the IBEW. Indeed, the only evidence touching on this point is the job descriptions contained in Article 601 of the line work agreement, Mr. Tersigni’s testimony which indicates that the intent of the parties to the agreement was to encompass employees who might otherwise be represented by the Labourers Union, as well as the fact that apart from instances where Labourers Local 183 holds bargaining rights, the line work agreement has generally been applied to all employees of contractors engaged in the installation of street and highway lighting and traffic lights. This evidence suggests that the parties to the agreement view labouring work in connection with the installation of highway lighting such as was performed on the job in Ottawa as coming within the jurisdiction of the IBEW.

13. In support of its contention that the line work agreement does not cover labourers, applicant’s counsel relies on the fact that the respondent has a collective agreement with Labourers Local 183 and employs people in the Toronto area pursuant to that agreement. Labourers Local 183, however, acquired its bargaining rights six years prior to the first line work agreement. The action of the parties to that agreement in drafting a broad recognition clause could not serve to defeat the established bargaining rights of Local 183. Such established bargaining rights did not, however, exist in the Ottawa area at the time the first line work agreement was entered into.

14. The applicant contends that the interveners’ challenge to its application is in the nature of a work jurisdiction claim, and submits that the Board should follow its normal practice of not deciding such claims in the context of a certification application. The Board’s practice is, in fact, to generally avoid making any determination as to whether certain work should be performed by one trade classification or another when dealing with a certification application. See: *Simple-Goooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908. These proceedings, however, do not involve a simple dispute as to which classification should perform certain work. Rather, the issue is whether the line work agreement encompasses within its scope individuals who in other contexts would be described as construction labourers. A fair reading of the agreement indicates that it does and that they come within the classifications of groundman and utilityman.

15. Having regard to all of the above, we are satisfied that the persons whom the applicant seeks to represent are within the bargaining unit covered by the line work agreement. The evidence establishes that the most recent line work agreement was ratified on July 20, 1986. Accordingly, it was in force at the time the instant application was filed. Pursuant to the provisions of section 5 of the Act, the application is untimely and accordingly is hereby dismissed.

0853-86-U; 0956-86-U Canadian Union of Public Employees, Complainant v. Umfreville District School Area Board, Respondent

Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - Unprecedented six week layoff, withholding of vacation pay, and cancellation of summer hours constituting unfair labour practices - Each party required to set out in writing and in detail a complete statement of its position on compensation issue if parties unable to agree on amount of compensation to be paid grievors

BEFORE: *R. O. MacDowell*, Vice-Chair, and Board Members *R. Pirrie* and *R. Wilson*.

APPEARANCES: *Alex Muselius, Janey Puurula, Laurie Morgan, Diana Coulombe* and *Sandra Law* for the complainant; *G. L. Firman, L. Fontana* and *D. Knight* for the respondent.

DECISION OF THE BOARD; March 16, 1987

I

1. These are two related complaints under section 89 of the *Labour Relations Act*, which were consolidated and heard together. The union complains that the grievors have been dealt with contrary to sections 64, 66, and 79 of the Act. In essence, the union contends that the grievors have been penalized because they have exercised their statutory right to seek trade union representation. The union asserts that previously announced wage increases were cancelled, vacation pay customarily paid was withheld, the employees were denied the opportunity to work favourable "summer hours" as they had done in the past, and, finally, they were subjected to an unprecedented six week layoff. The respondent does not dispute these events, but denies that there was any anti-union motivation.

II - The Legal Framework

2. Before reviewing the evidence, it may be useful to briefly set out the legal framework within which the parties' rights must be determined. The provisions of the statute upon which the grievors rely are as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

We should also mention section 89(5) of the *Act*, which deals with the burden of proof:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

3. Sections 64 and 66 appear in that portion of the *Act* dealing with "unfair labour practices". Their purpose is fairly obvious. Freedom of association, and free collective bargaining, are concepts fundamental to our system of labour relations. Indeed, the preamble to the *Act* provides that "it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining ...". Section 3, guaranteeing the right to "join a trade union...and participate in its lawful activities" is a further declaration of employee rights, which is now buttressed by the Constitutional protection for "freedom of association" found in the Canadian Charter of Rights and Freedoms. However, these rights would be rather hollow without effective remedies for their infringement. That is the role of the "unfair labour practice" sections of the Act. It is an unfortunate reality that, although these employee rights have been entrenched in Ontario law for more than forty years, there are still some employers who are prepared to use their control over their employees' work and livelihood, to punish those who have the temerity to join a trade union. The unfair labour practice sections provide a remedy and a deterrent.

4. An unfair labour practice proceeding typically begins with a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated, or otherwise dealt with contrary to the Act, as to his employment, opportunity for employment or conditions of employment (to repeat the words of section 89(5) mentioned above). In applying sections 64 and 66 to the impuned employer conduct, the Board must determine whether the reasons given for it are the only reasons, and whether the employer's actions are tainted, in any way, by anti-union animus. The improper motive need not be the only or even the dominant one. It is sufficient if it was in the mind of the employer at the time, and one of the grounds for the action taken (see *R. v. Bushnell Communications Ltd. et al* (1973) 1 O.R. (2d) 442 (H.C.J.), affirmed 4 O.R. (2d) 288 (C.A.); *Re. J.M.L. Shirts Ltd. and Industrial Relations Board* 78 CLLC ¶14,122 (N.B.Q.B.), affirmed 18 N.B.R. (2d) 695 (S.C. Appeal Division); *Westinghouse Canada Ltd.* [1980] OLRB Rep. Apr. 577, affirmed by the Ontario Divisional Court at 80 CLLC ¶14,062.)

5. Since in our experience, employers seldom admit to an anti-union animus, the question of motive usually becomes the key issue in an unfair labour practice case, and the Board must generally rely upon circumstantial evidence, and draw inferences about the employer's motivation from all of the surrounding circumstances - not just the articulated reason for the conduct under review. We should emphasize, though, that it is not a matter of this Board "second guessing" an employer's decision, or imposing the Board's own notions of "fairness" upon the situation. Nor is it a question of whether the employer "likes unions" or is "anti-union" in some general sense. The question is whether the employer conduct of which the employee complains was influenced in whole, or in part, by employee activity protected by the statute. There must be a causal connection between *animus* and *action*.

6. Section 79 is a little different. It does not require anti-union animus *per se* - although changes in the terms and conditions of employment or employee privileges caught by 79 may *also* be a "traditional" unfair labour practice if improperly motivated. Section 79 is intended to freeze all incidents of the employment relationship, in their entirety, while an application for certification is pending before the Board, and if a certificate is granted, during the collective bargaining process until the right to strike/lock-out accrues. In determining the precise content of the employment relationship that is "frozen", the Board considers not only the written or formal terms of the relationship, but also such other benefits or privileges as the employees have been accustomed to receive and could reasonably expect to continue to receive (see: *Simpsons Limited* [1985] OLRB Rep. March 469; *Simpsons Limited* [1985] OLRB Rep. Apr. 594; and *W.H. Smith Canada Ltd.* [1986] OLRB Rep. June 920). The "freeze provisions" maintain "business as usual", quite apart from any consideration of the reason why the employer might be moved to alter the existing *status quo*.

III - Credibility

7. In an unfair labour practice case where motive is an issue, the credibility of the witnesses is obviously an important factor. So it was here. Over the course of the hearing we were presented with considerable oral and documentary evidence supporting the parties' respective versions of "the facts", and not surprisingly, those versions differed on some points; however, we do not think that it is necessary to embark upon any extensive analysis of the witnesses' relative credibility, or to try to reproduce, in these reasons, a transcript of the testimony. It suffices to say that, in assessing the witnesses' evidence, we have taken into account their demeanor when giving testimony, their performance under cross-examination, the clarity, consistency and apparent quality of their recollections, the "reasonableness" of their version of the facts in light of contradictory evidence or evidence pointing to an alternative view, and what seems to us to be most probable in all the circumstances. In applying those criteria to the witnesses' testimony, we are inclined to prefer

the evidence of the union witnesses whenever it differs on any material point from that of the witnesses called by the employer.

IV

8. The respondent is an administrative unit known as an “isolate Board”. It has no school under its responsibility, but is retained as a legal entity to provide services to other isolate Boards. The staff provides educational counselling, help with financial planning, and assistance to children who must leave home to attend school in Thunder Bay. Important responsibilities include the location of boarding homes for these children and responding to any resulting problems in the home or at school. Currently, there are approximately eight employees in a bargaining unit consisting of “territorial student program counsellors” and clerical support staff. Denis Knight is the respondent’s office manager, who reports to Larry Fontana, Director of Education for Atikokan. Fontana’s responsibilities include supervising the respondent’s programs.

9. The union applied for certification on June 10, 1986. The Board assigned a terminal date of June 20, 1986, and a hearing date of July 4. Notice of the certification application was received in the respondent’s office around noon on June 13.

10. The staff were concerned about the potential adverse reaction of Denis Knight, but decided that it was best to get the matter over with. Diane Coulombe put the certification notice on the top of the pile of mail which was placed on Knight’s desk for his review. A little later Knight emerged from his office to advise the employees that they would be receiving a wage increase of 4.9%. This was somewhat unexpected because they had previously been told that there would be no wage adjustment until October. Knight maintains that the announcement had nothing to do with the application because he had not yet seen the notice of certification. Knight first testified that he made the announcement after an inquiry of the Ministry of Education following the request of one of the employees; however, that employee was not identified and there is no evidence that any of the bargaining unit members ever made such request. Subsequently, Knight said that he had been instructed by Fontana, to advise the employees of their increase. He was closely cross-examined on this point because he had previously denied speaking to Fontana on June 13. When pressed, he said that there was no specific contact with Fontana; it was a “standing instruction”. In our view it seems more probable that Knight’s rather unexpected announcement of a wage increase was a response to the certification application.

11. Knight testified that he was not at all disturbed by the employees’ decision to join the union even though one might construe that decision as a challenge to or repudiation of his management style. That was not Larry Fontana’s evidence. Fontana testified that Knight called him on *June 13*, the day Knight received the certification notice, and was “flabbergasted” to learn that the employees had joined a union. The employee witnesses confirmed that Knight was upset upon receipt of the certification notice and in succeeding days he no longer joined the staff at coffee breaks, preferring to remain in his office with the door closed. Victor Beluz, the respondent’s financial officer, told a couple of employees that because of the union activity, Knight would no longer provide pastries for the scheduled coffee breaks, and might do away with the practice of abbreviated summer hours. Beluz was concerned about the loss of summer hours, because, although he is excluded from the bargaining unit, he found the practice convenient.

12. Beluz’s prediction turned out to be entirely accurate: Knight did discontinue both his practice of buying pastries and permitting the employees to work abbreviated summer hours. Knight testified that he stopped buying pastries because he was on a diet. When asked when the diet started, he said that he was always on a diet. Those answers simply did not have the ring of truth. In our view, it is more probable that Knight was simply hurt by the apparent challenge to his

position - a reaction which is entirely understandable and not in itself illegal. But he would have been more candid to simply admit, as he did to Fontana (but not this Board) that he was disturbed by the organizing drive with its implicit repudiation of his management style. We also note that, in our experience, it is a very unusual employer who welcomes the prospect of dealing with a trade union or who testifies, as Fontana did, that he "loves" dealing with a trade union. We doubt it.

13. On June 19, 1986, the previously announced wage increase was cancelled. That same day, the counsellors in the territorial student program were informed of their layoff from July 1, 1986, until at least mid-August. They were advised that specific notice of recall would be sent approximately two weeks before their required return to work. There was no specific return date.

14. The layoff was unprecedented and, to the employees, quite inexplicable. So was a memo that they received four days later requiring them to return all credit cards and office keys, and to remove all personal belongings from the respondent's premises. If, as the respondent now says, it was only a temporary layoff, there was no need for such directions. Certainly there is no suggestion that the employees would abuse their keys or credit cards, nor was there any reason for them to do so.

15. The respondent's position is that the layoff decision was made on June 12, 1986, *before* its officials had any knowledge of the union - although the layoff notice was not issued until a week later. Knight and Fontana testified that they made the decision on their own, after a meeting with Ministry of Education officials to discuss the respondent's activities. Fontana testified, initially, that he was just too busy to advise the employees of their impending layoff or to instruct Knight to do so. In cross-examination, he said that he made a conscious decision not to tell the employees. He did not elaborate.

16. The difficulty with the respondent's position is that it is not at all obvious that any layoff was necessary, nor was its conduct consistent with its alleged concerns. Although Fontana professed reservations about the future of the program, on June 12, the very day of the alleged layoff decision, Fontana and Knight were interviewing an individual whom they wished to add to the employee complement. That hardly suggests a lack of work; and, it would appear that an additional part-time worker had also recently been added to the staff. Fontana testified that his "overriding concern was about costs", but he never turned his mind to what the saving might be, given that a number of employees had scheduled vacations during the anticipated layoff period. Indeed, one employee planned to be off for a total of six weeks which made her layoff somewhat superfluous.

17. Knight said that there was no less work than in previous years, yet this year a layoff was allegedly necessary. He too echoed a concern about costs, but he had no idea how much was saved by the layoff. His only comment was that "busy people are happy people". He did not think that the counsellors were sufficiently busy. There was no budgetary pressure to reduce staff or costs because the salary budget had already been fixed and approved, and any surplus would not remain with the respondent in any event. There was no pressure from the Ministry of Education for a layoff. Victor Beluz, the respondent's financial officer, was not even consulted, and in fact, the wage saving is a miniscule percentage of the annual budget.

18. The employees testified that there was quite a bit of work to do in July and August and Knight admitted that he really did not know how many boarding homes would be required in the fall of 1986 or if the work load in that respect was greater or less than in previous years. He said that he had little direct involvement with or knowledge of this aspect of the respondent's operation. That is why he and Fontana were interviewing a new employee who would take over such coordinating functions.

19. In the summer of 1986, after notice of the certification application, the respondent also changed its practice with respect to vacation pay. Previously, the employees had been paid their full entitlement prior to taking their vacations. The calculation had always been based on the assumption that the employees would continue in full-time employment for the full calendar year. In 1986, however, the employees received only part of their vacation pay entitlement. Knight had no explanation for this change. He merely said that it was the respondent's "managerial prerogative".

20. During the regular school year the bargaining unit employees typically work from 9 a.m. to 5 p.m. with a one hour lunch break. After July 1st, they were accustomed to work from 8.30 a.m. to 4 p.m. - again with a one hour lunch break. These "summer hours" had been implemented for several years and involved an earlier start, an earlier departure, and one half hour less work without a corresponding reduction in pay.

21. In 1986, the respondent decided not to implement summer hours as it had done in past years. Knight said that the respondent had been advertising for prospective boarding homes and needed employees to be available to take telephone calls between 4 p.m. and 5 p.m. - something which he had done in the past but, he said, he was unable to do in 1986. It is not clear why; and to the extent that the quest for boarding homes was an important responsibility to be completed prior to the beginning of the new school year, one questions why the employees engaged in that task were laid off. Knight said he did not know whether it was typical to receive calls between 4.00 p.m. and 5.00 p.m. He merely hypothesized that contacts might be lost (assuming that neither he nor Beluz answered the phone and the caller did not call back.) Knight also circulated a memo threatening discharge if any employee left early. This too was quite unusual.

22. The union urges us to consider the evidence in its totality - the wage increase announced and subsequently cancelled, the unprecedented cancellation of summer hours, the unprecedented withholding of vacation pay, the unprecedented layoff, - and conclude that the respondent was penalizing its employees for their decision to opt for trade union representation. To put the matter colloquially, the message was: "no more Mr. nice guy". The indulgences, privileges, and benefits previously granted to the employees would be rescinded and, while the employer never previously laid off employees during the summer when the work load declined somewhat, it would henceforth do so. The employees would be made to pay for the decision.

23. Having regard to the totality of the evidence, we accept the union's characterization of the events. In our view, the respondent decided that, once the employees had opted for trade union representation they should be denied the benefits that they were previously accustomed to receive and laid off if the respondent could get along, temporarily, without them. We find that, but for the certification application, the employees would not have been laid off, they would not have been denied payment of vacation pay on the established formula, and they would not have been denied the opportunity to work the "summer hours" which they had enjoyed in past summers. Having regard to the totality of the evidence, including the credibility of the respondent's witnesses, we do not find the respondent's explanation to be plausible or probable in all the circumstances.

Decision and remedy

24. We find and declare that the employer conduct outlined above, and, in particular, the layoff of employees, the cancellation of summer hours, and the withholding of the employees' vacation pay was contrary to sections 64, 66 and 79 of the *Labour Relations Act*. We direct that the grievors be compensated, forthwith, for all wages and benefits lost as a result of their untimely lay-off. Such compensation shall include interest calculated in accordance with Practice Note 13. If any

question arises about the amounts payable to the relevant grievors, the Board will remain seized and will, if necessary, schedule a hearing to deal with that question. However, prior to any such hearing, each of the parties will be required to set out in writing, *and in detail, a complete statement* of its position on the compensation issue together with a summary of the evidence upon which it may rely if the matter is litigated.

25. The cancellation of summer hours was undoubtedly annoying to the employees concerned and was indicative of the employer's anti-union animus; but, at this point, we do not think that any specific remedy is warranted other than a declaration that the employer's conduct was illegal.

2906-86-R; 2907-86-R St. Catharines Typographical Union No. 416, Applicant v. 570662 Ontario Limited, carrying on business as **We're Econoprint Fast**, Respondent

Certification - Petition - Practice and Procedure - Petition filed after terminal date by employee who mistakenly believed he was not in the bargaining unit - Description of unit not amended subsequent to posting - Request to extend terminal date denied - Employees had reasonable notice of proceedings - Employer misleading employee as to his status not sufficient grounds to extend terminal date - Petition untimely

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Peacock*.

APPEARANCES: *M. Farson*, *L. Trachuk*, *Richard Weatherton* and *B. Halden* for the applicant; *David Hagarty* and *Rod Joannis* for the respondent; *Richard D. Penner* and *Allan Roussy* for a group of employees.

DECISION OF THE BOARD; March 3, 1987

1. The name of the respondent is amended to read: "570662 Ontario Limited".
2. These are two applications for certification in which certain matters have already been addressed by Board decisions dated February 5, 1987 ("the Gray panel decision") and February 16, 1987 ("the Tacon panel decision").
3. The parties were able to agree on partial descriptions of the bargaining units as follows:

Bargaining Unit #1

All employees of the respondent in St. Catharines, Niagara Falls, and Welland, Ontario, save and except the president, the accountant, the area supervisor, the production supervisor, the art director and persons regularly employed for not more than twenty-four hours per week.

Bargaining Unit #2

All employees of the respondent in St. Catharines, Niagara Falls and Welland, Ontario regularly employed for not more than twenty-four hour per week, save and except the president, the accountant, the area supervisor, the production supervisor and the art director.

4. The parties had previously identified a number of positions which the respondent claimed should be excluded from the bargaining unit (and recited as excluded in the bargaining unit description) by virtue of section 1(3)(b) of the *Labour Relations Act*. The applicant disputed this claim.

5. Rather than appointing a Board Officer to conduct an examination of the disputed positions at that point, the Tacon panel found that this was an appropriate case in which to require the respondent to file a written statement of the duties and responsibilities attached to the disputed positions. A hearing was then scheduled for the following week in which it was anticipated the Board would hear evidence on this dispute directly from the parties.

6. Subsequent to the Tacon panel hearing, the respondent filed a set of job descriptions in which the duties and responsibilities of the disputed positions were set out in very general terms.

7. At the commencement of the hearing before us, counsel for the applicant raised two preliminary matters. Firstly, she argued that the material filed by the employer with respect to positions in the accounting and administration area did not disclose a *prima facie* case that the positions should be excluded from the bargaining unit. Secondly, she took the position that the employer's failure to produce the individuals at the hearing whose positions were disputed should result in a dismissal of its claim with respect to those persons not produced. The only persons whose positions were in dispute who attended the hearing were two store managers who represented a group of objectors.

8. Given that the onus of proof was on the respondent making the allegations, that the hearing was structured differently than an examination and that the material filed by the respondent was so vague, the Board determined that the most expeditious way of handling the dispute was to reserve on the preliminary matters and proceed to hear all the available evidence. In view of the Board's eventual disposition of the matter described below, we do not find it necessary to rule on the preliminary matters at all.

9. A group of objectors also appeared at the hearing to request an extension of the terminal date fixed in these matters, so that an untimely statement of desire filed by the objectors in opposition to the union would be accepted by the Board. After hearing the submissions of the parties, the Board declined to extend the terminal date. We advised the parties that our reasons would appear in our written decision. We now provide those reasons.

10. Richard Penner, who spoke on behalf of the objectors, told the Board that he had seen the Board's Notice to Employees of Application for Certification and of Hearing when it was posted in various locations in the work place. It was not disputed that these forms were posted on January 27, 1987. The terminal date was fixed for February 3, 1987, one week later. Mr. Penner admitted that he had read the notices, although he had not read them very carefully as he was under the impression that he would not be part of the bargaining unit. As a result of reading the notices, he was also aware that there would be a hearing in this matter. However, it was only after the hearing before the Tacon panel on February 13, 1987 when the employer advised him that his position was in dispute that he circulated the statement of desire. That statement was filed with the

Board on February 19, 1987, almost a week after the first day of hearing and more than two weeks after the terminal date. The Notice to Employees posted by the Board specifically stipulates that a statement of desire must be filed before the terminal date of February 3, 1987 and states that any statement of desire not in compliance will not be accepted by the Board.

11. Section 73(1) of the Board's Rules of Procedure sets out the following requirements for membership evidence:

Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,
 - (i) the return mailing address of the person who files the evidence, objection or signification, and
 - (ii) the name of the employer; and
- (b) is filed not later than the terminal date for the application.

12. As the Board commented in *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183, the wording of section 73(1) is mandatory and evidence which does not meet its requirements "shall not be accepted by the Board". The Board has consistently required strict compliance with these provisions (see *Addressograph-Multigraph*, *supra*). In *The Westin Hotel*, [1986] OLRB Rep. Oct. 1486, the Board commented as follows:

It is our view that the terminal date, and Rules relating to it, are not technical matters. Furthermore, the need for clear rules and their consistent application requires the Board to make it clear to parties when their documents will be considered filed and when all evidence must reach the Board. The question of the appropriate terminal date is not equivalent to the failure to name an employer on a petition or the failure to designate the section under which a complaint has been made, situations in which amendments are permitted; rather, as pointed out above, it addresses a matter of significance in labour relations: the date at which all parties can be satisfied all evidence must be filed if it is to be considered by the Board.

13. In this case, Mr. Penner's submissions can be reduced to the proposition that because he believed he was not in the bargaining unit, he did not take the appropriate action until it was too late.

14. The Board's Notice to Employees also sets out a description of the bargaining unit applied for by the applicant. In this case, the notices included a description of full-time and part-time bargaining units as follows:

All employees of the Respondent in St. Catharines, Ontario, Niagara Falls, Ontario, Welland, Ontario save and except President, Accountant, Supervisor, and persons above such ranks and employees employed less than 24 hours per week.

All part-time employees of the Respondent in St. Catharines, Ontario, Niagara Falls, Ontario and Welland, Ontario employed less than 24 hours per week.

15. Mr. Penner maintains that he considered that his position of store manager was above the rank of a supervisor and thus he concluded that he was not in the bargaining unit. This is inconsistent with the job descriptions filed by the respondent which describe store managers as reporting to supervisors, and set out the store managers in a subordinate position to supervisors in a promo-

tion schematic. The respondent also assured the Tacon panel that store managers ranked below supervisors at the hearing on February 13, 1987. However, Mr. Hagarty suggested that the employer may have misled Mr. Penner in this regard.

16. On the basis of the representations and material before us, we are satisfied that employees had reasonable notice of these proceedings. This is not a case where the description of the bargaining units posted in the Notice to Employees was amended or expanded subsequent to the posting. Nor will the dispute with respect to the composition of the bargaining unit have the effect of expanding that description, regardless of how it is finally resolved. Moreover, the terms of the Notice to Employees and the bargaining units described therein should have alerted Mr. Penner to the possibility that his position might be included in the bargaining unit.

17. Even assuming, without finding, that the employer did mislead Mr. Penner in the manner Mr. Hagarty described, we would not consider that sufficient grounds for extending the terminal date. As the Board pointed out in *Nick Masney Hotels Limited*, [1968] OLRB Rep. Dec. 961, employees rely on the advice of their employer with respect to this kind of issue at their peril. There were a number of options available to Mr. Penner if he wished to clarify his legal position. If he chose not to pursue them, the Board cannot now salvage his case for him without doing some damage to the integrity of the terminal date system. As a result, we declined to extend the terminal date. Consequently, we were not prepared to accept the statement of desire in accordance with Rule 73(1).

18. We note that the Gray panel contemplated the possibility that an extension of the terminal date might be requested as a result of the possibility of amendments to the applicant's applications, which were subsequently granted by the Tacon panel. There was no suggestion or allegation that the objectors' request before us was made on the basis of any of the matters canvassed by the Gray panel.

19. As a result of our ruling on this point, and a change in the applicant's position with respect to one of the disputed positions, it became clear that the dispute with respect to the composition of the bargaining units could not affect the applicant's right to certification in either application. On the basis of the evidence before us, we determined that more than fifty-five per cent of the employees of the respondent in each of bargaining unit #1 and bargaining unit #2 at the time the applications were made were members of the applicant on February 3, 1987, the terminal date fixed for this application and the date which the Board determined, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. We therefore decided that interim certificates would issue for each of the bargaining units described above and advised the parties accordingly. Formal certificates must await the resolution of the bargaining unit dispute.

20. We note that in arriving at this determination, we reviewed the form of membership evidence carefully with the concerns raised by the Gray panel in mind, and we were satisfied that the membership evidence conformed to the *Labour Relations Act*, the Board's Rules of Procedure, and the jurisprudence thereunder.

21. By this time, it was late in the day and the circumstances of the case had changed significantly from those the Tacon panel had addressed. We therefore appointed a Board Officer to inquire into and report back to the Board on the dispute with respect to positions occupied by the following individuals:

Allan Roussey, store manager, was challenged by the respondent on the

basis that he exercised managerial functions within the meaning of section 1(3)(b) of the Act.

Nancy Green, store manager, was challenged by the respondent on the basis that she exercised managerial functions within the meaning of section 1(3)(b) of the Act.

Lyn Larson, store manager, was challenged by the respondent on the basis that she exercised managerial functions within the meaning of section 1(3)(b) of the Act.

Julie Cullen, accounting and administration, was challenged by the respondent on the basis that she was employed in a confidential capacity in matters relating to labour relations.

Tracy Kimpel, accounting and administration, was challenged by the respondent on the basis that she was employed in a confidential capacity in matters relating to labour relations.

Paul Woodward, sales executive, was challenged by the respondent on the basis that he was employed in a confidential capacity in matters relating to labour relations.

Lynn Kapkey, sales, was challenged by the respondent on the basis that she was an employee of another company and also on the basis that she exercised managerial functions within the meaning of section 1(3)(b) of the Act.

Gary Bowering, maintenance, was challenged by the respondent on the basis that he was not an employee of the respondent.

22. This matter is referred to the Registrar.

0641-86-U George Xerri, Complainant v. Local 112 UAW Canada, Respondent

Duty of Fair Representation - Unfair Labour Practice - No collective agreement in effect when grievance filed - Preliminary objection to Board jurisdiction dismissed - Fair representation duty continues after expiry of agreement - One and one half year delay in processing complainant's grievance that employer did not recall complainant during lay off - No explanation for delay - Non-caring attitude constituting arbitrary conduct - Union ordered to process grievance

BEFORE: *Judith McCormack*, Vice-Chair.

APPEARANCES: *George Xerri* on his own behalf; *John Bettes* and *Jerry Dias* for the respondent.

DECISION OF THE BOARD; March 9, 1987

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent union has violated section 68 of the Act by failing to properly pur-

sue his grievance and refusing to refer it to arbitration. The employer, De Havilland Aircraft of Canada Limited did not appear in this matter although duly notified of the proceedings.

2. At the commencement of the hearing, Mr. Bettes raised an objection to the jurisdiction of the Board to hear the complaint on behalf of the respondent. He argued that since the previous collective agreement and the statutory freeze had both expired on June 22, 1984, there was no collective agreement in effect between the respondent union and the employer at the time Mr. Xerri's grievance was filed on September 14, 1984. A new collective agreement was not entered into until May 23, 1985, and its terms are stipulated to be effective as of March 9, 1985. It is somewhat difficult to determine when the events occurred which gave rise to his grievance. Mr. Bettes submitted an arbitration award *De Havilland Aircraft of Canada Limited*, June 25, 1986 (unreported) in support of his position.

3. Mr. Xerri did not dispute the facts described by Mr. Bettes, although he opposed the preliminary objection. The Board then ruled as follows:

Under section 68 a union which is entitled to represent employees has certain responsibilities and obligations with respect to that representation. Those responsibilities are enforced, in the words of the section "so long as it continues to be entitled to represent employees in a bargaining unit". This phrase refers to the union's representation rights which flow from the various procedures stipulated under the *Labour Relations Act* including certification and voluntary recognition. In this case, there is no suggestion that the union was not certified to represent the complainant during the period in question or that the complainant was outside this scope of the bargaining unit. As a result, its responsibilities under section 68 continue to operate regardless of whether the collective agreement had expired or not. Of course, the responsibilities may take on a different character depending on the kind of representation the union has the power to provide in various circumstances. However, this is an issue that goes to the merits of the case rather than one which deprives the Board of jurisdiction.

4. Turning now to the merits of the case, Mr. Xerri gave evidence on his own behalf. He advised the Board that he commenced employment with De Havilland Aircraft of Canada Limited in October of 1983 and worked there in various capacities until he was laid off on March 9, 1984. There was no dispute that during this period he was an employee in a bargaining unit represented by the respondent.

5. At the end of August 1984, he discovered through casual conversations that two of his co-workers had been recalled to work. As a result, he approached Dave Spalding, the union's plant chairman, for assistance. Mr. Xerri was advised that a recall letter dated March 3, 1984 had been sent by the employer by registered mail to a number of employees including Mr. Xerri. Mr. Xerri maintains that he did not receive notices alerting him to the fact that there was a registered letter in his name waiting for him at the post office, and thus did not receive the letter itself.

6. Mr. Spalding referred him to Martyn Rix, the employer's supervisor of industrial relations, who asked Mr. Xerri to produce a statement from the post office. Mr. Xerri obtained a statement which was somewhat equivocal and submitted it to Mr. Spalding.

7. Mr. Spalding in turn took it to Robin Nagel, the employer's manager of labour relations, and subsequently informed Mr. Xerri that the company did not accept this letter as evidence that notices of the recall letter had not been delivered. Mr. Spalding then suggested that Mr. Xerri

sign a grievance, which he did. Mr. Spalding also asked him for proof that he was not working at the time of the recall.

8. On September 21st, Mr. Xerri called Mr. Spalding and received no answer. Several days later, he called Mr. Spalding again who told him that he had also signed the grievance and that it would take some time to process. On October 2, 1984, Mr. Xerri called Mr. Spalding and left a message since he was not home. Mr. Spalding returned his call that day and they discussed the case briefly. At that time Mr. Spalding advised Mr. Xerri that he would be speaking to the bargaining committee about his grievance.

9. On October 3rd, Mr. Xerri called Mr. Spalding and asked if there had been any answer from the bargaining committee. Mr. Spalding said that he had mentioned the case to the committee and told them that Mr. Xerri was "straight", that is, that he was not lying or playing games. He also told Mr. Xerri that his grievance was coming up for discussion sometime within the next week or the following week. Mr. Xerri suggested that he was considering calling the Labour Board and Mr. Spalding told him to wait until Mr. Xerri had received some response.

10. A week later he called Mr. Spalding again and was told that he was away on an arbitration case. On October 15th, he called Mr. Spalding and was told that the respondent union and the employer were starting negotiations for a new contract and that the union would present Mr. Xerri's case to the employer at negotiations.

11. Several days later, Mr. Xerri visited the union hall for the purpose of seeing Mr. Spalding and was told that he was not in. He then spoke to Norm Smart, the union's local treasurer, and Roy Kellette, a member of the bargaining committee, who happened to be in the office at the time. They told him that they had notified the committee of his grievance and that they sympathized with him. Mr. Xerri gave Mr. Smart and Mr. Kellette copies of his first and last unemployment insurance benefit stubs in response to Mr. Spalding's request for proof that he had not been working at the time of the recall.

12. On October 24, 1984, Mr. Xerri spoke to Mr. Spalding again, and was advised that the latter was doing everything he could. Mr. Spalding also told him that he would be bringing Mr. Xerri's case to the company's attention in the next meeting.

13. The following week Mr. Xerri spoke to Mr. Spalding again and asked him why his case was not being taken to arbitration. Mr. Spalding told him that at the moment his "best bet" was to have his grievance raised at the bargaining table and that Mr. Spalding would raise it again on the following day.

14. On November 7, 1984, Mr. Xerri spoke to Mr. Spalding again and was advised that the union had now commenced that part of negotiations in which grievances were discussed. However, since there were a number of grievances, his case was still a long way from being heard. He told Mr. Xerri that he had heard of a similar case to Mr. Xerri's but did not specify further. Mr. Xerri subsequently wrote again to the Canada Post in an attempt to obtain a more definitive statement without much success. He again received a sympathetic but non-committal letter which he took to Mr. Spalding.

15. Mr. Spalding advised him that he did not think the new letter was of much assistance to Mr. Xerri. At that time Mr. Kellette, Merv Gray and Aldo Vendetti, who are also members of the negotiating committee, were present. Mr. Kellette and Mr. Gray suggested to Mr. Spalding that he speak to Lockie Reid, director of industrial relations for the company, to ask whether Mr. Xerri

could fill out a new application for employment. Mr. Spalding accordingly called Mr. Reid who agreed to allow Mr. Xerri to complete a new application, which he did.

16. On November 27th, Mr. Xerri called the personnel department and inquired as to whether his application had been reviewed. He was told that there were hundreds of applications, and that his would have to be examined in its turn.

17. The following day he spoke to another person in charge of applications for employment and asked her whether his application form had been brought to Mr. Reid's attention. She advised Mr. Xerri that she had not been informed of any such application and that it was not proper procedure. As a result, his application would have to wait its turn.

18. On November 29th, Mr. Xerri again went to see Mr. Spalding and told him what he had learned from the personnel department. Mr. Spalding said that he was not surprised to hear what Mr. Xerri was telling him. When Mr. Xerri asked him to explain further, Mr. Spalding said that he had spoken to Len Bone, the supervisor of the heat treat department where Mr. Xerri had worked prior to his layoff. Mr. Spalding had asked Mr. Bone if he would take Mr. Xerri back and Mr. Bone told him "no way". In fact, when Mr. Xerri filled out his new application form, he applied for a position in the press shop. Mr. Xerri pointed out to Mr. Spalding that Mr. Bone had no authority in the press shop department. Mr. Spalding told him "that's what you think, there's no chance in hell that you can come through those gates as a new start".

19. Mr. Spalding then suggested that Mr. Xerri go and see Mr. Bettes, the local president of the respondent union. Mr. Bettes was not in and as a result, Mr. Xerri spoke to Mr. Smart again. Mr. Smart agreed with Mr. Spalding that there was no chance of Mr. Xerri getting back into the plant as a new hire because of Mr. Bone's personal antipathy towards him.

20. On December 3, 1984, Mr. Xerri spoke to Mr. Bettes at the union hall and explained his situation. Mr. Bettes advised him that there wasn't much that he could do, other than attempting to negotiate a settlement of Mr. Xerri's grievance during contract negotiations. He also told Mr. Xerri that if his grievance was referred to arbitration, it might take up to a year to resolve.

21. Several days later, Mr. Xerri spoke to Mr. Bettes again and he asked if there had been any developments in his case. He was told by Mr. Bettes that contract talks had broken off between the union and the employer.

22. On January 7, 1985, Mr. Xerri called Mr. Spalding again and was told that nothing had changed and that the company and the union were still not talking. Shortly thereafter, Mr. Xerri heard a report on CJRT Radio that 2,000 pieces of mail had been lost or stolen, some dating back as far as 1979. Mr. Xerri then wrote to Brian Long, the acting president of the employer, explaining his situation.

23. On January 18, 1985, Mr. Xerri called Mr. Spalding again and asked him if he had heard anything with respect to his grievance. Mr. Spalding told Mr. Xerri that the grievance had been filed and that when the time came, he (Mr. Spalding) would debate it. Mr. Xerri asked when that time would be, and was told that Mr. Spalding did not know.

24. A week later, Mr. Xerri received a letter back from Lockie Reid in response to his letter to Mr. Long, advising him that there was no vacancy for Mr. Xerri at that time.

25. On February 8th and February 18th, Mr. Xerri called Mr. Spalding, only to be told that there were no new developments in his case. When he called again in early March, Mr. Spalding

advised him that they were looking for an hotel where the union and the employer could meet to discuss the grievances. On March 25th, Mr. Xerri called Mr. Spalding and once again was told that nothing new had occurred.

26. At the end of March, Mr. Xerri called Mr. Bettes again and was told that his case was being taken care of and to have patience. On April 8th, Mr. Xerri called Mr. Spalding again and was told that nothing had changed.

27. Several weeks later, Mr. Xerri heard about another employee, Larry Harris, who had similarly failed to respond to a recall notice and had been accepted back by the company. Mr. Xerri called Mr. Spalding to ask about this case. He was told that Mr. Harris had only allowed seven and a half days to expire past the seven days allowed for recall, and that this was the reason why he had been accepted back by the employer. Mr. Spalding told Mr. Xerri that his case was totally different and that the best that he could do was to get Mr. Xerri in as a new start, which would be difficult in itself. At the end of April, Mr. Xerri wrote a letter to Bob White, the respondent's Canadian director.

28. In May, Mr. Xerri called Mr. Spalding and was told that the employer had come close to rehiring him as a new start, but since Mr. Xerri was against it, the union did not pursue it. Mr. Spalding told him since Mr. Xerri wanted full redress, the union was going to take his case to arbitration. Mr. Spalding had no idea when this would occur. Mr. Xerri explained to the Board that he was afraid to take a position again as a new start because he was concerned that his seniority would be so low that he would be laid off shortly thereafter. By this time he had found a job with another employer and although his seniority position was very low, he did not wish to give up that job for one in which he had even less job security.

29. On June 4, 1985, Jim O'Neil called Mr. Xerri on behalf of Mr. White and advised him that he had contacted Mr. Spalding and told him to present Mr. Xerri's case to arbitration. He told Mr. Xerri that since Mr. Bone had retired, he would call Jerry Dias, the new plant chairman and Mr. Spalding's successor, to see if he could get Mr. Xerri some assistance.

30. On July 10, 1985, Mr. Xerri spoke to Mr. Dias who confirmed that he had spoken to Jim O'Neil. Mr. Dias took photostat copies of Mr. Xerri's material and told him that his only chance was to get in as a new start and that he was going to look into Mr. Xerri's case. A month later, Mr. Xerri called Mr. Dias who told him that he had spoken to the bargaining committee with respect to the chances of his case going to arbitration. He asked Mr. Xerri to call him back the following Monday. On August 27th, Mr. Xerri called Mr. Dias again and was told that his grievance had been referred to arbitration. He explained that it would be approximately one month before Mr. Xerri heard anything about it. Mr. Xerri told Mr. Dias that Mr. Spalding had already given him the impression that his grievance had been referred to arbitration some months ago, and Mr. Dias replied that he did not know why Mr. Spalding would say that.

31. The following month Mr. Xerri called Mr. Dias and was told that the union was awaiting dates for the arbitration from the company, and that it would be another month before Mr. Xerri heard anything. In October, Mr. Xerri called Mr. Dias and was told that he was off sick for two weeks.

32. In November, Mr. Xerri called Mr. Dias and was told he was still sick. Mr. Dias returned the call the same day indicating that he wanted to set up a meeting to review Mr. Xerri's case with the bargaining committee and Mr. Xerri. Mr. Xerri made arrangements for the meeting with the acting plant chairman, Aldo Vendetti.

33. On November 18th, a meeting took place between Mr. Xerri, Mr. Dias, Mr. Kellette, Mr. Gray, Mr. Bettes and Mike Lewis, another member of the local executive. Mr. Xerri told the Board under cross-examination that most of the meeting was taken up with discussing whether Mr. Xerri had been working in a bakery at the time of the recall. The subject was raised when Mr. Dias asked him about it shortly after the meeting began, and Mr. Bettes, who was not originally in the room, came "charging in" (according to Mr. Xerri) and started arguing with Mr. Xerri about whether he had been working at a bakery owned by himself and three other brothers at the time of the layoff and recall. The meeting lasted a total of approximately three quarters of an hour.

34. On December 9th, 1985, Mr. Xerri called Mr. Dias who told him that no date for arbitration has been set as yet. The next time he reached Mr. Dias was on December 19th, when he was told that Mr. Dias had discussed the matter with Mr. Bettes and was advised by Mr. Bettes that the earliest anything could be done was the beginning of February.

35. On February 6, 1986, Mr. Xerri called Mr. Dias and was told that he was at a meeting. Several days later, he called again and was told by Mr. Dias that he was going to discuss Mr. Xerri's case right away and that Mr. Xerri's case was third in line to be discussed. He told Mr. Xerri to call him in two weeks' time. On February 24th, Mr. Xerri called Mr. Dias and was told that his case had been pushed back to sixth in line to be discussed. He was also told that Mr. Dias had spoken to Mr. Bettes and that the latter had told him that Mr. Xerri did not stand a chance in hell of getting back into the plant. Mr. Dias also told Mr. Xerri that he was going to talk to a Mr. Murphy about his case and that he would call him back.

36. At the beginning of April, Mr. Xerri wrote to Jim O'Neil again. On April 23, 1986, Mr. Dias called Mr. Xerri and told him that nobody was going to push his case and that therefore it was "dismissed". Mr. Xerri subsequently initiated the present proceedings.

37. At the conclusion of Mr. Xerri's evidence, the respondent advised the Board that he was not planning to call any evidence. Because neither the complainant nor the respondent were represented by counsel, the Board brought to their attention the fact that only sworn testimony or documents submitted into evidence in the appropriate manner would be relied upon by the Board in arriving at a decision. The parties assured the Board that they understood and were prepared to rely on the evidence tendered to that point. Submissions were then made with respect to the conclusions the Board should draw from the evidence.

38. The essence of Mr. Xerri's complaint is that over a period of almost 1-1/2 years, little had been done by the union to pursue and resolve his grievance. During that period of time, he had been told a variety of contradictory things about the progress of his grievance by various union officials. In his own words, he felt that he had been "given the run-around".

39. He was particularly concerned that his case was treated differently from that of Mr. Harris without, in his view, good reasons, and also objected to the extent the union focused on whether he had been working at the bakery after he was laid off. Further, Mr. Xerri pointed to a letter of intent in the collective agreement which provides as follows:

Consideration of Ex-employees

The Company will give consideration as new hires to suitable and qualified ex-employees who lost their seniority due to the exhaustion of their recall rights during the period of 1981 to date of ratification, provided they reapply for employment between date of ratification and April 15, 1985.

Mr. Xerri was not advised of this clause by the union at the appropriate time so as to allow him to

apply for employment again in accordance with this section, although he had previously applied for employment as described earlier.

40. Mr. Bettes argued vigorously that even Mr. Xerri's evidence demonstrates that substantial activity was undertaken by the union on his behalf. He agreed that the registered letter system is not infallible and, in his view, the company acted in a highhanded manner with respect to Mr. Xerri's case. However, he also argued that the grievance was so obviously unlikely to be successful at arbitration that the Board should conclude that this was the determining factor in the union's decision not to refer it to arbitration. In this regard, he pointed to what he characterized as an admission by Mr. Xerri that the employer was correct in the position it was taking on the grievance.

41. Mr. Bettes further suggested that the question of whether Mr. Xerri was working at a bakery related to his credibility, which was of importance because the nature of his grievance meant that credibility would be a critical issue in that case. In other words, if Mr. Xerri was not telling the truth about working in the bakery, the union was entitled to explore this since it touched upon the question of what he described as the "winnability" of the grievance. Finally, Mr. Bettes specifically noted that he was not relying on the facts relating to the timing of the grievances raised in the preliminary objection as a defence to the merits of complaint.

42. Section 68 provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

43. The Board elaborated on its approach to section 68 in *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant consideration. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

44. It is well established that section 68 does not require a union to forward a grievance to arbitration solely because an employee desires to have his or her "day in court". As the Board commented in *Catherine Syme*, [1983] OLRB Rep. May 775:

20. Section 68 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in the number of cases, in assessing the merits of a grievance a trade

union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

45. Turning first to Mr. Xerri's allegation of discrimination, I do not find that the differential treatment of the complainant's case and Mr. Harris' case constitutes discrimination within the meaning of section 68. There was no positive evidence that invidious or unjustifiable distinctions were drawn between the two cases by the respondent. In the same vein, there was insufficient evidence on which to conclude that the circumstances of these two individuals were so similar that differential treatment would reasonably suggest that such distinctions must have been drawn. As a result, that aspect of Mr. Xerri's complaint fails.

46. The emphasis placed by the respondent on whether Mr. Xerri was working in a bakery at the time of the layoff is a matter of greater concern. While there was no evidence from the union to explain their particular interest in this subject, it is clear from Mr. Xerri's testimony that the matter was raised on a number of occasions by union officials.

47. The collective agreement filed does not disclose any obvious reason why such a fact would be relevant in evaluating the merits of a grievance on this point. There was no suggestion that the respondent routinely considered the economic position of grievors in determining whether or not to pursue grievances or that there were other policies or practices involved.

48. With respect to Mr. Bettes' suggestion that the work issue was a matter of credibility, we recognize that it may well be appropriate in some circumstances for a union to assess a grievor's credibility in considering the viability of a grievance. However, there was no evidence to support Mr. Bettes' contention that this was the reason for the respondent's interest. If anything, the evidence suggested that Mr. Spalding believed the grievor and vouched for his veracity in discussing the matter with the bargaining committee.

49. The respondent's preoccupation at the meeting in November with whether Mr. Xerri was working in the bakery at the time of his recall is especially troubling because it appears that this was a more formal session convened to hear Mr. Xerri's presentation and to discuss his grievance. The fact that most of the meeting was consumed with a discussion of the bakery suggests that an irrelevant factor was considered by the union in determining the fate of Mr. Xerri's grievance.

50. The pattern of the respondent's interaction with Mr. Xerri is also cause for concern. It appears to have taken from September of 1984 until April of 1986 for the respondent to decide whether to pursue Mr. Xerri's grievance to arbitration. Even allowing some time for the processing of the grievance through the grievance procedure and for the intervention of contract negotiations, this seems an unreasonably long time to make such a decision in the absence of any explanation for the delay.

51. This delay was coupled with considerable inconsistency in the information that was given to Mr. Xerri from time to time. We note that there was some turnover in the position of plant chairman which may have played a role in this regard. Again, however, no explanation was forthcoming to reconcile or account for the conflicting statements made to Mr. Xerri about the progress of his grievance.

52. The respondent invited us to conclude that the grievance was so unlikely to be successful that the respondent must have made the decision not to proceed on that basis. There was simply no evidence from which we can draw such a conclusion, and I am not prepared to infer such a result in circumstances where evidence on this point could have been called.

53. Nor do I find persuasive Mr. Bettes' suggestion that Mr. Xerri admitted the grievance was without merit in his testimony. It was clear that English is a second language for Mr. Xerri. It would be more accurate to describe Mr. Xerri's comments as indicating that the position taken by the employer with respect to his grievance was not an inappropriate or surprising position for an employer to take in the circumstances. In any event, the issue before the Board is how the respondent came to the decision it did, rather than the complainant's perception of the merits of his grievance at the time of the hearing of his complaint against the union.

54. There was no evidence of any malice or deliberate ill will on the part of the respondent towards the complainant. The Board must therefore address whether the respondent's conduct in this matter can be considered arbitrary. This task is complicated by the difficulty in assigning an exact meaning to this branch of section 68. The Board canvassed this problem in *Walter Prinesdomu*, [1975] OLRB Rep. May 444 as follows:

...Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word "arbitrary" with the word "perfunctory" and observed that a trade union, "in a non-arbitrary manner [must] make a decision as to the merits of particular grievances." It could be said that this description of the duty requires the exclusive bargaining agent to put "its mind" to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but at the same time it lacks any precise parameters and thus it is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes or unbecoming laxness.

* * *

...An approach to a grievance may be wrong or a provision inadvertently overlooked and Section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection...

55. On the limited evidence available in this case, the respondent's treatment of Mr. Xerri was, at the very least, markedly careless. While each of the matters raised above might not alone be sufficient to substantiate a complaint under section 68, taken together they present a pattern of treatment that can only be characterized as cavalier. I do not doubt that Mr. Xerri's unflagging persistence and frequent telephone calls may have been a source of some irritation for the respondent. However, it is hard to fault Mr. Xerri's tenacity given the diffidence and inconsistency with which he was faced. The subject of the grievance had serious implications for Mr. Xerri, given that it involved the forfeiture of his job and his seniority rights. In the context of such a grievance, it is difficult to consider the respondent's conduct as merely exhibiting an unbecoming laxness. While I recognize that some efforts were made on Mr. Xerri's behalf, the evidence that it is possible to glean from his testimony indicates that such efforts were intermittent and half-hearted. In the absence of any explanation, such desultory activity falls below the standard of conduct required by section 68.

56. In short, I find that the complainant has established a *prima facie* case that the respondent's treatment of him reflects such a non-caring attitude that it falls within the ambit of arbitrary representation. In that sense this case can be distinguished from *Boise Cascade*, [1982] OLRB Rep. July 981. As a result, the absence of any explanation or justification for the union's conduct is critical. On the evidence before me, I conclude that the respondent has violated section 68. Pursuant to section 89, the Board directs the respondent and the employer De Havilland Aircraft of Canada

Limited to forthwith process Mr. Xerri's grievance dated September 14, 1984, commencing at the first step of the grievance procedure and that the time limits set out in the grievance procedure in the collective agreement shall not bar the processing of his grievance. The Board further directs that any settlement of the grievance by the parties must be concurred in by Mr. Xerri and that failing such a settlement, the respondent union is directed to refer his grievance to arbitration. In the event that Mr. Xerri's grievance is referred to arbitration, any time limits in the collective agreement will similarly be of no effect in barring the referral. The Board remains seized of this complaint in the event that it becomes necessary to determine any apportionment of compensation between the employer and the union or problems arising out of implementation.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1520-85-R: Canadian Paperworkers Union (Applicant) v. DRG Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent, c.o.b. as DRG Stationery Company at Georgetown, save and except supervisors, persons above the rank of supervisor, personnel administrator, executive secretary, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit)

1661-85-R: The Southern Ontario Newspaper Guild, Local 87, Newspaper Guild (Applicant) v. Harlequin Enterprises Limited (Respondent)

Unit: "all editorial employees of the respondent in its Metroland Printing Publishing and Distributing Division in the Municipality of Metropolitan Toronto, the Regional Municipalities of Halton, Peel, York and Durham and the Township of West Gwillimbury, save and except, the publisher at each newspaper, the editor at each of Ajax/Pickering News Advertiser, Brampton Guardian, Burlington Post, Etobicoke Guardian/Lakeshore Advertiser, Markham Economist & Sun, Stouffville Tribune, Milton Canadian Champion, Mississauga News, Oakville Beaver, Oshawa/Whitby This Week, Richmond Hill/Thornhill/Vaughan Liberal, Scarborough Mirror, Willowdale/North York Mirror, editor-in-chief and managing editor at Newmarket Era/Aurora Banner/Topic Newsmagazine, managing editor at Mississauga News and at Georgetown Independent/Acton This Week, Burlington Post, Brampton Guardian, Markham Economist & Sun, Richmond Hill/Thornhill/Vaughan Liberal, and chief photographer at Mississauga News, Burlington Post and Oshawa/Whitby This Week" (143 employees in unit) (*Having regard to the agreement of the parties*)

2355-85-R: Labourers' International Union of North America, Local 493 (Applicant) v. E & E Seegmiller Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all other sectors of the construction industry in Board Area 17 (that is within a radius of 57 km of the City of Sudbury Federal Building), save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2452-85-R: United Food & Commercial Workers Union, Local 409 chartered by United Food & Commercial Workers International Union, CLC-AFL-CIO (Applicant) v. Worker's Co-operative of Consumers (Fort William) Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except assistant manager and persons above the rank of assistant manager" (15 employees in unit) (*Having regard to the agreement of the parties*)

0254-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Etna Foods of Windsor Limited (Respondent)

Unit: "all employees of the respondent in Leamington, Ontario, save and except forepersons, those above the

rank of foreperson, office and sales staff" (34 employees in unit) (*Having regard to the agreement of the parties*)

0869-86-R: Canadian Union of Public Employees (Applicant) v. Cours Claudel, c.o.b. Lycee Claudel (Respondent)

Unit: "all employees of the respondent in Ottawa, save and except Administrator, persons above the rank of Administrator, Secretary General, Proviseur, persons paid by the Government of France, volunteers on National Service with the Government of France during the active portion of their national service, and employees in bargaining units for which any trade union held bargaining rights as of June 26, 1986, being the date of the application" (11 employees in unit)

1288-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. 670154 Ontario Limited (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" (8 employees in unit) (*Having regard to the agreement of the parties*)

1457-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Zest Furniture Industries Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (53 employees in unit) (*Having regard to the agreement of the parties*)

1740-86-R; 1741-86-R: United Food & Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Mirabai Art Glass Ltd., c.o.b. as Xena Designs (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Leamington, and in the Township of Gosfield South, save and except supervisors, persons above the rank of supervisor, office staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (38 employees in unit)

1853-86: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. The Bryan Donkin Company of Canada Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Woodstock, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (38 employees in unit) (*Having regard to the agreement of the parties*)

1870-86-R: United Steelworkers of America (Applicant) v. A.S.P. Access Floors Inc., Architectural School Products Limited (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the respondents at the City of Mississauga, Ontario, save and except, foremen, persons above the rank of foreman, office and sales staff" (25 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2257-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Fritz Enterprises Inc. (Respondent)

Unit: "all employees of the respondent at Sault Ste. Marie, save and except superintendent and persons above the rank of superintendent" (10 employees in unit) (*Having regard to the agreement of the parties*)

2346-86-R: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO) (Applicant) v. Southam Inc. (Respondent)

Unit: "all employees of the respondent in the advertising department of The Expositor in Brantford, Ontario, save and except the advertising manager, the retail sales manager, the classified sales manager, the classified

phone room supervisor, the retail sales supervisor and the advertising manager's secretary" (32 employees in unit) (*Having regard to the agreement of the parties*)

2436-86-R: Ontario Nurses' Association (Applicant) v. Bennett Health Care Centre (Respondent) v. Employee (Objector)

Unit #1: (see *Bargaining Units Certified Subsequent to a Post-Hearing Vote*)

Unit #2: "all registered and graduate nurses, employed in a nursing capacity regularly employed for not more than 24 hours per week by the respondent in Georgetown, save and except Assistant Director of Resident Care, persons above the rank of Assistant Director of Resident Care, and employees in bargaining units for which any trade union held bargaining rights as of November 28, 1986" (9 employees in unit) (*Having regard to the agreement of the parties*)

2484-86-R: United Food & Commercial Workers' International Union, Local 175 AFL-CIO-CLC (Applicant) v. Cancoil Thermal Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all office, clerical and technical employees of the respondent in the County of Frontenac, save and except sales and marketing staff, professional engineers, managers and persons in any bargaining unit for which a trade union held bargaining rights as of December 3, 1986" (6 employees in unit)

2504-86-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Corporation of the Township of Dover (Respondent)

Unit: "all employees of the respondent in the Township of Dover, save and except foremen, persons above the rank of foreman, and office staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

2515-86-R: United Steelworkers of America (Applicant) v. Dominion Chain Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Acco Canadian Material Handling Division in the City of Hamilton, save and except foremen, persons above the rank of foreman, office and clerical staff, and students employed during the school vacation period" (29 employees in unit) (*Having regard to the agreement of the parties*)

2529-86-R: Le Syndicat Canadien de la Fonction Publique (Applicant) v. L'Association des Enseignantes et des Enseignants Franco-ontariens (Respondent)

Unit: "all employees of the respondent in Ottawa, save and except office manager and persons above the rank of office manager, and secretary to the Executive Director" (10 employees in unit) (*Having regard to the agreement of the parties*)

2574-86-R: Service Employees Union, Local 219 (Applicant) v. Wymering Manor Ltd. (Respondent) v. Renald Miner (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Ottawa, save and except managers and persons above the rank of manager and house co-ordinator" (31 employees in unit) (*Clarity Note*)

2583-86-R: Canadian Union of Postal Workers (Applicant) v. Federated Building Maintenance Company Limited (Respondent)

Unit #1: "all employees of the respondent at the Gateway Postal Facility at 4567 Dixie Road, in the City of Mississauga, save and except foremen and foreladies, persons above the rank of foreman and forelady, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (29 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at the Gateway Postal Facility at 4567 Dixie Road in the City of Mississauga, save and except foremen and foreladies and persons above the rank of foreman and forelady" (7 employees in unit) (*Having regard to the agreement of the parties*)

2601-86-R: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Ski Searchmont Limited Partnership, General Partner-612325 Ontario Limited (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2622-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Eclipse Excavating & Sales Ltd. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2631-86-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Marmorite Enterprises Limited and Lido Building Systems Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Milton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

2647-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. Nestreb Inc. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 1030 (Intervener)

Unit: "all employees of the respondent in Kingston Township, County of Frontenac, save and except foremen, persons above the rank of foreman, salespersons, and office staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

2688-86-R: Retail, Wholesale & Department Store Union, AFL-CIO-CLC (Applicant) v. 598537 Ontario Inc., c.o.b. as Warner Pro Hardware (Respondent)

Unit: "all employees of the respondent at London, save and except manager and persons above the rank of manager" (4 employees in unit) (*Having regard to the agreement of the parties*)

2701-86-R: Service Employees Union, Local 268 (Applicant) v. St. Joseph's General Hospital (Respondent)

Unit: "all office and clerical employees of the respondent regularly employed for not more than 24 hours per week and students employed in office and clerical positions during the school vacation period, save and except supervisors, persons above the rank of supervisor, members of the Congregation of the Sisters of St. Joseph of Sault Ste. Marie, confidential secretary to the Administrator, secretary and clerk employed in a confidential capacity in the office of the Personnel Director, confidential secretary to the Medical Director, confidential secretary to the Director of Nursing, confidential payroll clerk, payroll officer, head librarian, admitting officer, storekeeper, assistant medical records librarian and persons employed in co-operative work studies programmes" (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2746-86-R: Ontario Nurses' Association (Applicant) v. Alexandra Hospital (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the Respondent in Ingersoll, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the Respondent in Ingersoll regularly employed for not more than 24 hours per week save and except supervisors, persons above the rank of supervisor, and Quality Assurance/In Service" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2759-86-R: Ontario Provincial Conference of International Union of Bricklayers & Allied Craftsmen, Local 1-Hamilton, Ontario (Applicant) v. Swindel-Dressler Corp. of Canada Ltd. (Respondent)

Unit #1: "all journeymen and apprentice bricklayers and stonemasons in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Unit #2: "all journeymen and apprentice bricklayers and stonemasons in the employ of the respondent in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2760-86-R: Dufferin-Peel Teacher Assistants' Association (Applicant) v. The Dufferin-Peel Roman Catholic Separate School Board (Respondent)

Unit: "all teacher assistants employed by the respondent in its schools in the Regional Municipality of Peel and the County of Dufferin, save and except employees in bargaining units for which any trade union held bargaining rights as of January 7, 1987" (110 employees in unit) (*Having regard to the agreement of the parties*)

2782-86-R: Labourers' International Union of North America, Local 506 (Applicant) v. Big H. Construction, a Division of Big H. Limited (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

2797-86-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. All Type Metal Stamping Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Stoney Creek, save and except supervisors, those above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (50 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2800-86-R: Office & Professional Employees International Union (Applicant) v. Hamilton Teachers' Credit Union Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in the City of Hamilton, save and except Assistant

Department Managers, and persons above the rank of Assistant Department Manager and the confidential secretary to the General Manager” (23 employees in unit) (*Having regard to the agreement of the parties*)

2809-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. TRW Canada Ltd. (Respondent)

Unit: “all employees of the respondent in Belleville, save and except foremen, persons above the rank of foreman, office and sales staff” (38 employees in unit) (*Having regard to the agreement of the parties*)

2815-86-R: United Food & Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Beatrice Foods Inc. (Respondent)

Unit: “all employees of the respondent at its retail store, in its Colonial Cookies Division, in the City of Kitchener, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

2819-86-R: Service Employees Union, Local 183 (Applicant) v. Braun Wood Application Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at Belleville, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period” (49 employees in unit) (*Having regard to the agreement of the parties*)

2827-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Delhi-Sheldons Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its Delhi Industries Division in Delhi, save and except foremen, persons above the rank of foreman, office and sales staff, security guards, students employed on a co-operative training programme with a school, college or university, and students employed during the school vacation period” (73 employees in unit) (*Having regard to the agreement of the parties*)

2849-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. American Motors (Canada) Inc. (Respondent)

Unit: “all employees of the respondent at its Guelph Products Division, in Guelph, save and except foremen, persons above the rank of foreman, office and sales staff” (9 employees in unit) (*Having regard to the agreement of the parties*)

2857-86-R: The International Union of United Automobile, Aerospace & Agricultural Implement Workers of America UAW (Applicant) v. Corporation of the City of Chatham Board of Water Commissioners (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: “all office and clerical employees of the respondent in Chatham, Ontario save and except supervisors, persons above the rank of supervisor, manager’s secretary, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and those persons for which any trade union held bargaining rights as of January 16, 1987” (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity note*)

2887-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. St. Lawrence Excavating Inc. (Respondent)

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton

within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2899-86-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Ron Paolone Group (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2916-86-R: Ontario Public Service Employees Union (Applicant) v. Hamilton Wesley House (Respondent)

Unit: “all employees of the respondent in the City of Hamilton save and except Program Director, persons above the rank of Program Director and Secretary-Bookkeeper” (7 employees in unit) (*Having regard to the agreement of the parties*)

2945-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Strongwall Company Limited (Respondent)

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2957-86-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Marble Arch Investments Limited (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in all other sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

2960-86-R: Canadian Union of Public Employees (Applicant) v. County of Northumberland (Respondent)

Unit #1: “all employees of the respondent in the County of Northumberland, save and except supervisors,

persons above the rank of supervisor, secretary to the Chief Administrative Officer, secretary to the Social Services Administrator, secretary to the Administrator of the Golden Plough Lodge, persons employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of January 28, 1987" (18 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

2970-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Provenzano Excavating & Grading Ltd. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2971-86-R: Ontario Public Service Employees Union (Applicant) v. Gananoque & District Association for the Mentally Retarded (Respondent)

Unit: "all employees of the respondent at Gananoque, save and except director and secretary/bookkeeper" (4 employees in unit) (*Having regard to the agreement of the parties*)

2981-86-R: Ontario Public Service Employees Union (Applicant) v. Kinark Child and Family Services (Respondent)

Unit: "all employees of the respondent at Midland, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2984-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Jard Excavating & Grading Inc. (Respondent)

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2997-86-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph's General Hospital (Respondent)

Unit: "all lay technologists, technicians and assistants of the respondent in Thunder Bay, employed in its laboratory, radiology, nuclear medicine and respiratory technology departments, regularly employed for not

more than 24 hours per week, and students employed during the school vacation period, save and except chief technologists, head respiratory technologists, charge technologist in nuclear medicine laboratory and those above such ranks, and students in training” (12 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0701-85-R: Ontario Public School Teachers’ Federation (Applicant) v. Board of Education for the City of London (Respondent) v. Federation of Women Teachers’ Association of Ontario (Intervener)

Unit: “all occasional teachers employed by the respondent in its elementary panel, save and except persons in bargaining units for which any trade union held bargaining rights as of June 20, 1985, being the date of application” (379 employees in unit)

Number of names of persons on revised voters’ list		379
Number of persons who cast ballots	189	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		164
Number of ballots marked against applicant		22

0812-86-R: Ontario Catholic Occasional Teachers’ Association (Applicant) v. Carleton Roman Catholic Separate School Board (Respondent)

Unit: “all occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton, save and except those employees teaching in schools pursuant to Part XI of the *Education Act*, and employees in any bargaining unit for which a trade union held bargaining rights as of June 19, 1986” (262 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list		209
Number of persons who cast ballots	26	
Number of ballots marked in favour of applicant		24
Number of ballots marked against applicant		2

1274-86-R: Great Lakes Fishermen & Allied Workers’ Union (Applicant) v. 649857 Ontario Ltd., c.o.b. as Jerry Liddle Fishery and 649858 Ontario Inc., c.o.b. as Jack Liddle Fishery (Respondents)

Unit: “all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain” (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		1
Ballots segregated and not counted		4

1282-86-R: Great Lakes Fishermen & Allied Workers’ Union (Applicant) v. Remeloso & Sons Fisheries Ltd. (Respondent)

Unit: “all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		0

1284-86-R: Great Lakes Fishermen & Allied Workers’ Union (Applicant) v. Presteve Foods Limited (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" (13 employees in unit)

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		1

2170-86-R; 2171-86-R; 2222-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Plastics CMP Limited (Respondent) v. Cement, Lime, Gypsum & Allied Workers, a division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO-CLC (Intervener)

Unit: "all production and maintenance employees of the respondent at its plant at 400 Plastics Road, Peterborough, Ontario, save and except foremen and supervisors and persons above the rank of foreman and supervisor, office and sales staff, and students employed during the school vacation period, chemists in the plating department (previous C.M.P. division) and quality control department and persons regularly working not more than 24 hours per week in the moulding department (previous Kawartha Moulding Division)" (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		246
Number of persons who cast ballots	186	
Number of ballots marked in favour of applicant		176
Number of ballots marked in favour of intervener		10

2225-86-R: Canadian Union of Public Employees (Applicant) v. Bethany Lodge-Manor (Respondent)

Unit #1: (see *Applications for Certification Dismissed Subsequent to Post-Hearing Vote*)

Unit #2: "all employees of the respondent in Unionville regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered graduate and undergraduate nurses, technical, office and clerical employees, supervisors and persons above the rank of supervisor" (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons on revised voters' list		37
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		10

2232-86-R: Ontario Public School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the City of Ottawa, save and except employees in bargaining units for which any trade union held bargaining rights as of November 4, 1986" (373 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity note*)

Number of names of persons on revised voters' list		377
Number of persons who cast ballots	89	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	85	
Number of segregated ballots cast by persons whose names do not appear on voters' list	4	
Number of ballots marked in favour of applicant		88
Number of ballots marked against applicant		1

2672-86-R: Canadian Union of Public Employees (Applicant) v. Northwestern General Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener #1) v. Service Employees International Union, Local 204 (Intervener #2)

Unit: "all stationary engineers, maintenancemen and helpers employed at Northwestern General Hospital,

Toronto, Ontario, save and except the Director of Engineering, maintenance supervisor, those above the rank of maintenance supervisor and those persons for whom any trade union held bargaining rights as of December 19, 1986" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		13
Number of ballots marked in favour of intervener		0

2725-86-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Sketchley Cleaning Services Limited (Respondent)

Unit: "all employees of the respondent at 660 Eglinton Avenue East, Toronto, save and except foremen, persons above the rank of foreman, office, sales and clerical staff and persons regularly employed for not more than 24 hours per week" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		0

2741-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant)

Unit: "all employees of the respondent in Toronto save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, operating engineers and refrigeration mechanics" (750 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		742
Number of persons who cast ballots	743	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	600	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of spoiled ballots		6
Number of ballots marked in favour of applicant		490
Number of ballots marked in favour of intervener #2		105

2742-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Oshawa Public Utilities Commission (Respondent) v. Local 2028 of the International Brotherhood of Electrical Workers (Intervener)

Unit: "all employees of the respondent's Transit Department in Oshawa save and except inspector, foreman, persons above the rank of inspector and foreman, secretary to the transit superintendent and persons for whom any trade union held bargaining rights as of January 5th, 1987" (77 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons on voters' list at start of vote		77
Number of persons who cast ballots	66	
Number of ballots marked in favour of applicant		65
Number of ballots marked in favour of intervener		1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1872-86-R: Association of Employees of EECL (Applicant) v. Engineered Electric Controls Limited (Respondent) v. International Brotherhood of Electrical Workers, Local Union 804 (Intervener)

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office, sales and clerical staff and employees in bargaining units for whom any trade union

held bargaining rights as at August 24, 1986" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		9
Number of ballots marked in favour of intervener		14
Number of ballots marked in favour of No Trade Union		0

2299-86-R: Canadian Union of Public Employees (Applicant) v. Saga Canadian Management Services Ltd. (Respondent)

Unit: "all employees of the respondent in Ottawa at Carleton University regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except food service managers, supervisors and those above the rank of supervisor, office and clerical employees" (155 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		148
Number of persons who cast ballots	81	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		50
Number of ballots marked against applicant		29

2350-86-R: Canadian Union of Public Employees (Applicant) v. St. Joseph's Hospital (Respondent)

Unit: "all lay employees of the respondent in Hamilton, regularly employed for not more than 24 hours per week, students employed during the school vacation period save and except supervisors and persons above the rank of supervisor, Chief Engineer, Professional Medical Staff, Bacteriologists, Biochemists, Virologists, Paramedical staff including Graduate Pharmacists, Undergraduate Pharmacists, Graduate Dieticians, Undergraduate Dieticians, Student Dieticians, Physiotherapists, Student Physiotherapists, Student Physiotherapists, Occupational Therapists, Student Occupational Therapists, Speech Pathologists, Recreational Therapists, Programmer Analysts, Systems Analysts, Technical Personnel, Photographers, Psychometrists, Psychiatric Clinicians, Technologists, Technicians, Accountants, Employees of the Human Resources Department, Infection Control Officer, Health Nurse, Confidential Secretaries to the following: Executive Director, Associate Executive Director-Medical Director, Assistant Executive Director-Medical Services, Assistant Executive Director-Development, Assistant Executive Director-Finance and Human Resources, Assistant Executive Director-Planning & Special Programs, Assistant Executive Director-Nursing, Chief of Medical Staff, Administrative Assistant, Director of Laboratories, Director of Radiology and persons for whom any trade union held bargaining rights as of November 18, 1986" (305 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		216
Number of persons who cast ballots	103	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	102	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		97
Number of ballots marked against applicant		4
Ballots segregated and not counted		1

2436-86-R: Ontario Nurses' Association (Applicant) v. Bennett Health Care Centre (Respondent) v. Employee (Objector)

Unit #1: (see *Bargaining Units Certified Without Vote*)

Unit #2: "all registered and graduate nurses, employed in a nursing capacity regularly employed for not more than 24 hours per week by the respondent in Georgetown, save and except Assistant Director of Resident

Care, persons above the rank of Assistant Director of Resident Care, and employees in bargaining units for which any trade union held bargaining rights as of November 28, 1986” (2 employees in unit)

Number of names of persons on revised voters' list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0

Applications for Certification Dismissed Without Vote

1268-84-R: Ontario Secondary School Teachers' Federation (Applicant) v. Lincoln County Board of Education (Respondent) (80 employees in unit)

1149-85-R: Sheet Metal Workers International Association, Local 473 (Applicant) v. Con-Eng Contractors Inc. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 1946, Labourers' International Union of North America Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Interveners) (2 employees in unit)

2073-85-R: United Steelworkers of America (Applicant) v. Werner Dahnz Company Limited (Respondent) v. Group of Employees (Objector)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period” (57 employees in unit) (*Having regard to the agreement of the parties*)

3106-85-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Gilvesy Enterprises Inc. (Respondent) (3 employees in unit)

3139-85-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Tonda Construction Limited (Respondent) v. Group of Employees (Objectors) (11 employees in unit)

0403-86-R: Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 172 (Applicant) v. Belair Restoration (Ontario) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in masonry restoration work, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit) (*Having regard to the agreement of the parties*)

1276-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. 504578 Ontario Limited, operating as Murray Collard Fisheries (Respondent) (6 employees in unit)

1281-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Franklin Fishery (Wheatley) Inc. (Respondent) (10 employees in unit)

1458-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dawn Enterprises Limited (Respondent) (6 employees in unit)

2474-86-R: United Food & Commercial Workers International Union, AFL-CIO-CLC, Local 1230 (Applicant) v. Dutch Oven Food Services Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in the Municipality of Cobourg, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (24 employees in unit)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

2543-86-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. National Protective Service Company Limited (Respondent) (219 employees in unit)

2629-86-R: International Union of Operating Engineers, Local 796 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43 (Intervener)

Unit: "all employees of the respondent employed at the main sewage treatment plant at 1091 Eastern Avenue, Toronto, as stationary engineers, helpers and trainees, save and except the superintendent" (13 employees in unit)

2748-86-R: Union des Routiers, Brasseries, Liqueurs Douces & Ouvriers de Diverses Industries, Local 1999 (Teamsters) (Applicant) v. Le Droit Ltee, division de Groupe Unimedia Inc. (Respondent) v. Syndicate Quebecois de l'Imprimerie et des Communications, Local 145 (Intervener) (50 employees in unit)

2749-86-R: Union des Routiers, Brasseries, Liqueurs Douces & Ouvriers de Diverses Industries, Local 1999 (Teamsters) (Applicant) v. Le Droit Ltee, division de Groupe Unimedia Inc. (Respondent) v. Syndicate Quebecois de l'Imprimerie et des Communications, Local 145 (Intervener #1) v. Ottawa Graphic Communications Union, Local 62N (Intervener #2) (65 employees in unit)

2960-86-R: Canadian Union of Public Employees (Applicant) v. County of Northumberland (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in the County of Northumberland regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to the Chief Administrative Officer, secretary to the Social Services Administrator, secretary to the Administrator of the Golden Plough Lodge and persons for whom any trade union held bargaining rights as of January 28, 1987" (2 employees in unit) (*Having regard to the agreement of the parties*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2407-86-R: Service Employees International Union, Local 204, affiliated with the SEIU, AFL-CIO-CLC (Applicant) v. Allders International (Canada) Limited (Respondent)

Unit: "all employees of the respondent in the City of Mississauga regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office and clerical staff" (19 employees in unit)

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	18	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters list	18	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		15

2434-86-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers (Applicant) v. Seven-Up Canada Inc. (Respondent)

Unit: "all employees of the respondent at the City of Mississauga save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (370 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		364
Number of persons who cast ballots	317	
Number of spoiled ballots		2

Number of ballots marked in favour of applicant	125
Number of ballots marked against applicant	190

2678-86-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Square D Canada Electrical Equipment Inc. (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the City of Waterloo save and except supervisors, persons above the rank of supervisor, professional engineers and trainees, sales staff, persons employed for not more than 24 hours per week, students employed during the school vacation period or on a co-operative training basis with a school, college or university and persons for whom any trade union held bargaining rights as of December 22, 1986" (60 employees in unit)

Number of persons on voters' list at start of vote	56
Number of persons who cast ballots	56
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	54
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	46

2730-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Tridon Limited (Respondent) v. Tridon Employees Union (Intervener)

Unit: "all employees of the respondent in Burlington and Oakville, save and except assistant supervisors, supervisors, office and clerical staff, sales staff, technical staff, quality control staff and students employed during the school vacation period" (412 employees in unit)

Number of names of persons on list as originally prepared by employer	430
Number of persons who cast ballots	409
Number of ballots marked in favour of applicant	140
Number of ballots marked in favour of intervener	269

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1832-86-R: Amalgamated Clothing & Textile Workers Union, Toronto Joint Board (Applicant) v. Tilley of Canada Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, designers, industrial engineers, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (138 employees in unit)

Number of names of persons on list as originally prepared by employer	139
Number of persons who cast ballots	129
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	69

2225-86-R: Canadian Union of Public Employees (Applicant) v. Bethany Lodge-Manor (Respondent)

Unit #1: "all employees of the respondent in Unionville, save and except professional staff, registered, graduate and undergraduate nurses, technical, office and clerical employees, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Number of persons on revised voters' list	48
Number of persons who cast ballots	39
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	20

2474-86-R: United Food & Commercial Workers International Union, AFL-CIO-CLC, Local 1230 (Applicant) v. Dutch Oven Food Services Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Dismissed Without Vote*)

Unit #2: "all employees of the respondent in the Municipality of Cobourg regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (12 employees in unit)

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		8

2520-86-R: Canadian Paperworkers Union (Applicant) v. C-Tech Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Cornwall, save and except supervisors, persons above the rank of supervisor, engineering technicians, engineers, office, clerical and sales staff" (113 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		114
Number of persons who cast ballots	105	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		42
Number of ballots marked against applicant		62

Applications For Certification Withdrawn

0030-86-R: Retail, Wholesale & Department Store Union, AFL-CIO-CLC (Applicant) v. 500770 Ontario Ltd. (Respondent)

1946-86-R: Service Employees Union, Local 210 affiliated with Service Employees Union, AFL-CIO-CLC (Applicant) v. University Park Place, division of P. J. Woods Group, Inc. (Respondent)

2850-86-R: London & District Service Workers' Union, Local 220, SEIU, AFL-CIO-CLC (Applicant) v. The Corporation of the City of London (Respondent) v. The Canadian Union of Public Employees (Intervener)

2864-86-R: International Brotherhood of Electrical Workers, Local 1563 (Applicant) v. Square D Canada Electrical Equipment Inc. (Respondent)

2908-86-R: Pebra Peterborough Employees Association (Applicant) v. Pebra Peterborough Inc. (Respondent) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Intervener)

2913-86-R: International Union United Plant Guard Workers of America, Local 1962 (Applicant) v. Olympia & York Developments Limited (Respondent)

2924-86-R: United Steelworkers of America (Applicant) v. Doug McCallum The Mover Ltd. (Respondent)

2927-86-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) Hembruff & Dambrowitz Ltd. (Respondent)

2966-86-R: United Food & Commercial Workers International Union (Applicant) v. Highland Beverages Limited (Respondent)

2969-86-R: International Brotherhood of Painters & Allied Trades-Local 1795-Glaziers (Applicant) v. Whyte & Braniff Glass Ltd. (Respondent)

3047-86-R: Service Employees Union, Local 183 (Applicant) v. Carewell Campbellford Nursing Home (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1048-84-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Arnold's Industrial Electrical Company Limited and Markville Electric Company Ltd. (Respondents) (*Granted*)

2313-84-R, 2314-84-R, 2315-84-R, 2316-84-R, 1178-86-R, 1179-86-R, 1181-86-R, 1182-86-R: Retail, Wholesale & Department Store Union, Local 579 AFL-CIO-CLC (Applicant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., 510662 Ontario Limited, Romeo Sauve and Diane Sauve (Respondents) (*Granted*)

2061-85-R: United Brotherhood of Carpenters & Joiners of America, Local 1256 (Applicant) v. Gilbert Construction (1981) Ltd. and 598471 Ontario Limited carrying on business as Project Developments (Respondents) (*Granted*)

0392-86-R: The Ontario Pipe Trades' Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 71 (Applicant) v. N.D. Barbeau Mechanical Limited (Respondent) (*Granted*)

1013-86-R and others on Schedules 'A' & 'B': Retail, Wholesale & Department Store Union, Local 414, AFL-CIO-CLC (Applicant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd. and all respondents listed on Schedule 'A' (Respondents), and, Termarg Food Services Limited, Stalba Enterprises Inc., Carma Groceries (Ontario) Inc., 548082 Ontario Limited, 568429 Ontario Limited, Ron Nelson's Foods Ltd., Jorfy Foods Inc., Read-Wentworth Markets Ltd., Stroudal Marketing Ltd., 571726 Ontario Inc., W & J Holdings Limited, R.G.T. Marketing Limited, Stonegate Marketing Ltd., Kerland Foods Ltd., 578588 Ontario Inc., 580265 Ontario Limited, Jules Foods Limited, 579679 Ontario Inc., Lars Persson Active Marketing Inc., Challis Groceries Limited (Applicants) v. Retail, Wholesale & Department Store Union, Local 414, AFL-CIO-CLC (Respondent) (*Granted*)

1175-86-R; 1176-86-R: Retail, Wholesale & Department Store Union, Local 545, AFL-CIO-CLC (Applicant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., 510688 Ontario Limited and Claude Brunet (Respondents) (*Granted*)

1696-86-R: Sheet Metal Workers' International Association, Local Union 47 (Applicant) v. McKissock Roofing Limited, McKissock & Son Roofing Limited and Water-Shed Industrial Roofing Ltd. (Respondents) (*Withdrawn*)

1871-86-R: United Steelworkers of America (Applicant) v. A.S.P. Access Floors Inc., Architectural School Products Limited (Respondents) (*Granted*)

2204-86-R: Service Employees Union, Local 210 (Applicant) v. University Park Place, division of P.J. Woods Group Inc., Mrs. Isabel Woods, Paul Woods, John Woods (Respondents) (*Withdrawn*)

2296-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. G.C. Carpentry Limited and Pilan Properties Limited (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

SALE OF A BUSINESS

2313-84-R, 2314-84-R, 2315-84-R, 2316-84-R, 1178-86-R, 1179-86-R, 1181-86-R, 1182-86-R: Retail, Wholesale & Department Store Union, Local 579, AFL-CIO-CLC (Applicant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., 510662 Ontario Limited, Romeo Sauve and Diane Sauve (Respondents) (*Granted*)

1013-86-R and others on Schedules 'A' and 'B': Retail, Wholesale & Department Store Union, Local 414 AFL-CIO-CLC (Applicant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd. and all respondents listed on Schedule 'A' (Respondents), and, Termarg Food Services Limited, Stalba Enterprises Inc., Carma Groceries (Ontario) Inc., 548082 Ontario Limited, 568429 Ontario Limited, Ron Nelson's Foods Ltd., Jorfy Foods Inc., Read-Wentworth Markets Ltd., Stroudal Marketing Ltd., 571726 Ontario Inc., W & J Holdings Limited, R.G.T. Marketing Limited, Stonegate Marketing Ltd., Kerland Foods Ltd., 578588 Ontario Inc., 580265 Ontario Limited, 579679 Ontario Inc., Lars Persson Active Marketing Inc., Challis Groceries Limited (Applicants) v. Retail, Wholesale & Department Store Union, Local 414, AFL-CIO-CLC (Respondent) (*Granted*)

1175-86-R; 1176-86-R: Retail, Wholesale & Department Store Union, Local 545, AFL-CIO-CLC (Applicant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., 510688 Ontario Limited and Claude Brunet (Respondents) (*Granted*)

1696-86-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. McKissock Roofing Limited, McKissock & Son Roofing Limited and Water-Shed Industrial Roofing Ltd. (Respondents) (*Granted*)

1926-86-R: Hotel Employees & Restaurant Employees Union, Local 75 (Applicant) v. Country Gold, c.o.b. in Diamond Lil's at the Skyline Hotel (Respondent) (*Granted*)

2296-86-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. G. C. Carpentry Limited and Pilan Properties Limited (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

2487-86-R: United Steelworkers of America (Applicant) v. Canada Machinery Corporation (Respondent) v. International Association of Machinists & Aerospace Workers, Local Lodge #1740 (Intervener) (*Granted*)

2933-86-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Collavino Incorporated, McCall Contractors Incorporated, Collavino-McCall Contractors Limited, Indal Limited c.o.b. as Fabricated Steel Products and/or Fabricated Steel Products (Windsor) Limited (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2666-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Locals 200 (Windsor), 584 (Bramalea), 707 (Oakville), 1054 (Niagara) & 1520 (St. Thomas) (Applicants) v. Ford Motor Company of Canada Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0732-84-R: Dave Kusluski and Carole Hull (Applicants) v. Retail, Wholesale and Department Store Union, Local 414 (Respondent) (*Withdrawn*)

0733-84-R: Steve Borzush and Leslie MacLean (Applicants) v. Retail, Wholesale & Department Store Union, AFL-CIO-CLC, Local 414 (Respondent) (*Withdrawn*)

0734-84-R: Margaret Forma and John McKenzie (Applicants) v. Retail, Wholesale & Department Store Union, AFL-CIO-CLC, Local 414 (Respondent) (*Withdrawn*)

0735-84-R: Joyce Valliere and William Ariss (Applicants) v. Retail, Wholesale & Department Store Union, AFL-CIO-CLC, Local 414 (Respondent) (*Withdrawn*)

0754-84-R: Chris Billyard (Applicant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) v. 580266 Ontario Ltd. (Intervener #1) v. Dominion Stores Limited (Intervener #2) (*Dismissed*)

0784-84-R: Jeffrey Sywyk (Applicant) v. Retail, Wholesale & Department Store Union, AFL-CIO-CLC, Local 414 (Respondent) (*Withdrawn*)

3217-85-R: Nikki Lindsay (Applicant) v. St. Catharines Typographical Union, Local 416 (Respondent) v. High Times Publications Limited (Intervener)

Unit: “all employees of High Times Publications Ltd. at St. Catharines save and except managing editor, manager, bookkeeper, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation” (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	17	
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		12

2084-86-R: Larry Maxwell, Keith K. Primmer and Kevin Delorme (Applicants) v. The International Union of Operating Engineers, Local 796 (Respondent) v. The Manufacturers Life Insurance Company (Intervener)

Unit: “all building operators employed by The Manufacturers Life Insurance Company at 200 Bloor Street East North Tower, 200 Bloor Street East Tower and 250 Bloor Street East in the City of Toronto” (4 employees in unit) (*Granted*)

Number of persons on voters' list at start of vote		5
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		2

2251-86-R: Mary-Lou Elgie, Rita Jolicoeur, Jane Thomas and Carolyn Davis (Applicants) v. Canadian Union of Public Employees & its Local 1880 (Respondents) v. The United Way of Sault Ste. Marie (Intervener)

Unit: “all the office, clerical and technical employees of The United Way of Sault Ste. Marie in the City of Sault Ste. Marie, save and except office manager, persons above the rank of office manager, persons regularly employed for not more than 24 hours per week, and students employed during school vacation periods” (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

2319-86-R: Suzanne Hache (Applicant) v. Ontario Nurses' Association (Respondent) v. Kingston, Frontenac & Lennox & Addington Health Unit (Intervener)

Unit: “all registered and graduate nurses employed by Kingston, Frontenac and Lennox and Addington Health Unit, in a nursing capacity, save and except the supervisors and persons above the rank of supervisor” (64 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		64
Number of persons who cast ballots	52	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	51	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		47

2390-86-R: The London Soap Company Limited (Applicant) v. London & District Service Workers' Union, Local 220 (Respondent) v. Group of Employees (Interveners) (*Dismissed*)

2459-86-R: Mario Talbot (Applicant) v. United Steelworkers of America (Respondent) v. Amari Metals Inc. (Intervener)

Unit: "all employees of Amari Metals Inc. in the Municipality of Markham, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period" (28 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer		27
Number of persons who cast ballots	27	
Number of ballots marked in favour of respondent		16
Number of ballots marked against respondent		11

2642-86-R: Jerry O'Regan, Jim Johnston, Richard Thomas (Applicants) v. Retail, Wholesale & Department Store Union, Local 414, AFL-CIO-CLC (Respondent) (*Dismissed*)

2696-86-R: Brian Murray (Applicant) v. United Steelworkers (Respondent) v. Canadian Grinding Wheel Company (Intervener) (*Granted*)

2866-86-R: Kimberly Walker and Ann Zavitz (Applicants) v. Retail, Wholesale & Department Store Union, Local 440, Office Division (Respondent) v. Borden Foods, division of The Borden Company, Limited, Ingersoll Ontario (Intervener) (*Granted*)

2867-86-R: Aline Nicole Goodfellow, Robert Donald Dunbar, Shelley Margaret Marshall, James John Kwiatkowski, Arnold Jesmer (Applicants) v. Graphic Communications International Union, Local 41M (Respondent) v. Standard-Freeholder, division of Thomson Newspapers Company Limited (Intervener) (*Withdrawn*)

2894-86-R: Ann Murray (Applicant) v. St. Mary's of the Lake Hospital Employees' Association (Respondent) v. St. Mary's of the Lake Hospital (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3015-86-U: Cumberland Clothing Ltd. (Applicant) v. United Garment Workers of America, Local 253, Michael Duden, Harry Blay, Hyman Fishman, Leonard Glicksman, Moise Gonsko, Zyskin Goodman, Abram Meingarten, Sam Orlan, Secondo Pozzebon, Nissen Stern and Ludwic Tyndorf (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2953-86-U: Concord Square Limited (Applicant) v. Labourers' International Union of North America, Local 506 and Carmen Principato (Respondents) (*Withdrawn*)

3101-86-U: Acme Building & Construction Limited (Applicant) v. The International Brotherhood of Painters & Allied Workers, Local 1671 and Arthur Verners (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2074-85-U: United Steelworkers of America (Complainant) v. Werner Dahnz Company Limited (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

2679-85-U: Daniel Spencer (Complainant) v. International Brotherhood of Painters & Allied Trades, and its Local 1832, and Ontario Hydro (Respondents) (*Withdrawn*)

0469-86-U: Maria Fatima Costa (Complainant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Burlington Canada Inc. (Intervener) (*Dismissed*)

0532-86-U, 1420-86-U, 1470-86-U: Retail, Wholesale & Department Store Union, AFL-CIO-CLC (Complainant) v. Budget Rent-A-Car, division of 500770 Ontario Ltd. and Rhona Nesbitt (Respondents) (*Withdrawn*)

0587-86-U: Naresh Kumar Kaushal (Complainant) v. International Association of Machinists & Aerospace Workers (Respondent) v. Carter Automotive Canada Ltd. (Intervener) (*Dismissed*)

0676-86-U: Marcel Leclerc (Complainant) v. Amalgamated Transit Union, Local 1572 and Mississauga Transit (Respondents) (*Dismissed*)

0726-86-U: Michael Connolly and Ucal Powell (Complainants) v. United Brotherhood of Carpenters & Joiners of America, Carpenters' District Council of Toronto & Vicinity, Matt Whelan & United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondents) (*Dismissed*)

1015-86-U and others on Schedule 'C': Retail, Wholesale and Department Store Union, Local 454, AFL-CIO-CLC (Complainant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd. and all respondents listed on Schedule 'C' (Respondents) (*Withdrawn*)

1177-86-U: Retail, Wholesale & Department Store Union, Local 545, AFL-CIO-CLC (Complainant) v. Willett Foods, c.o.b. as Mr. Grocer, Domgroup Ltd., 510688 Ontario Limited and Claude Brunet (Respondents) (*Withdrawn*)

1180-86-U; 1183-86-U: Retail, Wholesale & Department Store Union, Local 579, AFL-CIO-CLC (Complainant) v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., 510662 Ontario Limited, Romeo Sauve and Diane Sauve (Respondents) (*Withdrawn*)

1216-86-U: Howard J. Howes (Complainant) v. United Steelworkers of America, Local 8222 (Respondent) v. Duomatic Olsen Inc. (Intervener) (*Granted*)

1299-86-U: International Woodworkers of America (Complainant) v. Koolatron Corporation (Respondent) (*Withdrawn*)

1487-86-U: CAW (Complainant) v. Medar Armax Mfg. Inc. (Respondent) (*Granted*)

1531-86-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation, No. 301 (Respondent) (*Withdrawn*)

1562-86-U: Labourers' International Union of North America, Local 183 (Complainant) v. Zest Furniture Industries Limited (Respondent) (*Granted*)

1579-86-U; 1580-86-U: United Food & Commercial Workers Union, Local 206 (Complainant) v. Altadore Quality Inn (Respondent) (*Withdrawn*)

1794-86-U: Amalgamated Clothing & Textile Workers' Union (Complainant) v. Genesta Manufacturing Limited & Hematite Manufacturing Limited (Respondent) (*Withdrawn*)

2131-86-U: Advance Paving Limited and D. Crupi & Sons Ltd. (Complainants) v. Labourers' International Union of North America, Local 183 and Teamsters Local Union 230, on behalf of themselves & acting as A Council of Trade Unions (Respondents) v. The Metropolitan Toronto Road Builders' Association (Intervener) (*Withdrawn*)

2163-86-U: Service Employees Union, Local 210 (Complainant) v. University Park Place, division of P. J. Woods Group Inc., Mrs. Isabel Woods, Paul Woods, John Woods (Respondents) (*Withdrawn*)

2224-86-U: Santis Morris (Complainant) v. Laundry & Linen Drivers & Industrial Workers, Local 847 (Respondent) (*Withdrawn*)

2250-86-U: Hans Jensen (Complainant) v. Klaus Klad (Respondent) v. The Hamilton Street Railway Company (Intervener) (*Withdrawn*)

2278-86-U: Maragret Horvath (Complainant) v. Bruce Boyd, President now Local 195, UAW (Respondent) v. Champion Spark Plug Company of Canada Limited (Intervener) (*Dismissed*)

2288-86-U: Retail, Wholesale & Department Store Union, AFL-CIO-CLC (Complainant) v. Budget Rent-a-Car, division of 500770 Ontario Ltd. (Respondent) (*Withdrawn*)

2344-86-U: Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Microfurnace Ltd. (Respondent) (*Withdrawn*)

2356-86-U: Manjinder Sidhu (Complainant) v. Stamping Local U.A.W. 458, Brantford (Respondent) (*Withdrawn*)

2455-86-U: Food & Service Workers of Canada, Local 54 (Complainant) v. Bond Place Hotel (Respondent) (*Withdrawn*)

2457-86-U: Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 & 2309 (Complainant) v. Robert Globe Electrical & Mechanical Ltd. (Respondent) (*Withdrawn*)

2525-86-U: Ontario Nurses' Association (Complainant) v. Baycrest Hospital (Respondent) (*Withdrawn*)

2636-86-U: Colette Lapointe (Complainant) v. The Canadian Labour Market & Productivity Centre (CLMPC), and Local 70293, Public Service Alliance of Canada (PSAC) (Respondents) (*Withdrawn*)

2537-86-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Cancoil Thermal Corporation (Respondent) (*Dismissed*)

2650-86-U: Charles Lester (Complainant) v. Echlin Can. Inc. and Local 5141, USWA (Respondents) (*Withdrawn*)

2657-86-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Lumley Demolition (Respondent) (*Withdrawn*)

2695-86-U: United Food & Commercial Workers Union, Local 175 (Complainant) v. Worker's Co-Op Ltd. (Respondent) (*Withdrawn*)

2719-86-U: Steve Fejer (Complainant) v. Les Kovacs-President CUPE Local 43 (Respondent) (*Withdrawn*)

2720-86-U: Aluminum, Brick & Glass Workers International Union (Complainant) v. LOF Glass of Canada Limited (Respondent) (*Withdrawn*)

2761-86-U: Health, Office & Professional Employees, division of Local 206, Retail, Wholesale & Department Store Union, chartered by the United Food & Commercial Workers International Union (Complainant) v. Deem Management Services Limited (Respondent) (*Withdrawn*)

2766-86-U: United Food & Commercial Workers International Union, CLC-AFL-CIO (Complainant) v. SAAN Stores (Respondent) (*Withdrawn*)

2786-86-U: Willis A. Chapman (Complainant) v. CAW (UAW) Union, Local 525 (Respondent) (*Withdrawn*)

2799-86-U: James Brown, Bruce Hanson, Dene Latimer, Warren Kells (Complainants) v. United Steelworkers of America (Respondent) (*Withdrawn*)

2835-86-U: United Food & Commercial Workers (formally Canadian Union of Brewery, Flour, Cereal, Soft

Drink & Distillery Workers), Local 326 (Complainant) v. Uniflex Packaging of Canada Limited (Respondent) (*Withdrawn*)

2848-85-U: Aluminum, Brick & Glass Workers International Union (Complainant) v. Lamilite Limited Limitee (Respondent) (*Dismissed*)

2859-86-U: Terry M. Bubar and Jerzyk Lorek (Complainants) v. United Steel Workers of America (Respondent) (*Withdrawn*)

2868-86-U: Violet Grenier (Complainant) v. United Steelworkers of America, Local 4509 (Respondent) (*Withdrawn*)

2880-86-U: Maria Caputo (Complainant) v. Booth Avenue Hospital Laundry, and Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351 (Respondents) (*Dismissed*)

2897-86-U: Teamster Local Union No. 879, affiliated with the International Union of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. All Type Metal Stampings Limited (Respondent) (*Withdrawn*)

2900-86-U: Hotel Employees & Restaurant Employees Union Local 604, Peterborough, Ontario (Complainant) v. Clovers Tavern (King George Hotel Inc.), Peterborough, Ontario (Respondent) (*Withdrawn*)

2915-86-U: Ontario Nurses' Association (Complainant) v. The Regional Municipality of Halton (Respondent) (*Dismissed*)

2918-86-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, CAW-Canada (Complainant) v. Glen White Industries Ltd. (Respondent) (*Withdrawn*)

2923-86-U: Francesco Femia (Complainant) v. Certified Brakes (a Division of Lear Siegler Company) (Respondent) (*Dismissed*)

2954-86-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Norwich Packers Ltd. (Respondent) (*Withdrawn*)

2975-86-U: Wagemans Diny (Complainant) v. Ontario Nursing Association (ONA) (Respondent) (*Withdrawn*)

2977-86-U: Service Employees Union, Local 219 (Complainant) v. Ketchum Manufacturing Sales Limited (Respondent) (*Withdrawn*)

2980-86-U: Oliver Lawrence (Complainant) v. Local Union 380 of United Food & Commercial Workers (Respondent) (*Withdrawn*)

2996-86-U: Ontario Public Service Employees Union (Complainant) v. Andrew Fleck Child Centre, Ottawa (Respondent) (*Withdrawn*)

3011-86-U: Parmjit Singh (Complainant) v. Ford Motor Company (Respondent) (*Withdrawn*)

3073-86-U: Sandra Major (Complainant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers Local Union 304 (Respondent) (*Withdrawn*)

3119-86-U: Labourers' International Union of North America, Local 183 (Complainant) v. Marble Arch Investments Ltd. (Respondent) (*Withdrawn*)

3134-86-U: Office & Professional Employees International Union, Local 343 (Complainant) v. Ontario Federation of Labour (Respondent) (*Withdrawn*)

3188-86-U; 3189-86-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Tonda Construction Limited (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

APPLICATIONS FOR CONSENT TO PROSECUTE

2458-86-U: Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 & 2309 (Applicant) v. Robert Globe Electrical & Mechanical Ltd., and Robert Globe Jr. (Respondents) (*Withdrawn*)

2909-86-U: International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin Contractor Limited (Respondent) (*Granted*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2581-86-M: United Steelworkers of America, Local 4815 (Trade Union) v. Canron Inc., Foundry Division (Employer) (*Granted*)

JURISDICTIONAL DISPUTES

2085-86-JD: Ontario Provincial Conference of the Operative Plasterers' & Cement Masons' International Association of the United States & Canada, on behalf of Local 598 (Complainant) v. Labourers' International Union of North America, Local 837 and Asbestos Covering Company Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1791-86-M: Corporation of the City of Brampton (Applicant) v. Canadian Union of Public Employees (Respondent) (*Withdrawn*)

1811-86-M: S.O.N.G. (Applicant) v. Toronto Star (Respondent) (*Withdrawn*)

1897-86-M: North Bay Hospital Commission, operating the North Bay Civic Hospital (Applicant) v. Canadian Union of Public Employees & its Local 2790, C.L.C. (Respondents) (*Withdrawn*)

2071-86-M: C.U.P.E., Local 368 (Applicant) v. City of Scarborough (Respondent) (*Withdrawn*)

2101-86-M: The Spectator (Applicant) v. Southern Ontario Newspaper Guild, Local 87 (Respondent) (*Withdrawn*)

2337-86-M: United Steelworkers of America (Applicant) v. Royal Tire Service Limited (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

1828-85-OH: Tim Carrie (Complainant) v. Firestone Steel Products of Canada (Respondent) (*Withdrawn*)

0133-86-OH: Marie V. Roy (Complainant) v. North American Plastics Company Limited, Peter Walker, Michael N. Brown, Steven Lemak and Lad Kaminsky (Respondents) (*Granted*)

2321-86-OH: James Mullins (Complainant) v. Rumble Pontiac Buick (1985) Inc. (Respondent) (*Withdrawn*)

2640-86-OH: Edith M. Lapierre (Complainant) v. Louis Roup, Revel Luminaires Inc. (Respondents) (*Withdrawn*)

2731-86-OH: Glen MacPherson (Complainant) v. Cyris Bouchard (Respondent) (*Withdrawn*)

2732-86-OH: Danny Thibault (Complainant) v. Cyris Bouchard (Respondent) (*Withdrawn*)

2733-86-OH: Glen MacPherson (Complainant) v. American Barrick Resources (Respondent) (*Withdrawn*)

2734-86-OH: Danny Thibault (Complainant) v. American Barrick Resources (Respondent) (*Withdrawn*)

2735-86-OH: Danny Thibault (Complainant) v. Forage R.M. Ltd. (Respondent) (*Withdrawn*)

2736-86-OH: Glen MacPherson (Complainant) v. Forage R.M. Ltd. (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

1713-85-M: Paul H. Tremblay (Applicant) v. Ontario Public Service Employees Union (Respondent Trade Union) v. Georgian College of Applied Arts & Technology (Respondent Employer) v. Attorney General of Ontario (Intervener) (*Dismissed*)

2986-86-U: The Ontario Public Service Employees Union & its Local 655 (Complainants) v. Cambrian College of Applied Arts & Technology (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0393-86-M: The Ontario Pipe Trades' Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. N.D. Barbeau Mechanical Limited (Respondent) (*Granted*)

1504-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Johnson Controls Limited (Respondent) v. Canadian Pneumatic Control Contractors Association (Intervener) (*Dismissed*)

1632-86-M: Labourers' International Union of North America, Local 625 (Applicant) v. McKay Cocker Construction Limited (Respondent) (*Withdrawn*)

1698-86-M: Sheet Metal Workers' International Association, Local 47 (Applicant) v. McKissock Roofing Limited, McKissock & Son Roofing Limited and Water-Shed Industrial Roofing Ltd. (Respondents) (*Withdrawn*)

1723-86-M: Quality Control Council of Canada (Applicant) v. Contract Inspection Services Co. Ltd. (Respondent) (*Granted*)

1725-86-M: The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Bennett & Wright Ltd. (Respondent) (*Withdrawn*)

1787-86-M: Labourers' International Union of North America, Local 837 (Applicant) v. Asbestos Covering Company Ltd. (Respondent) (*Withdrawn*)

2297-86-M: The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Bennett & Wright Ltd. (Respondent) (*Withdrawn*)

2464-86-M: Labourers' International Union of North America, Local 1089 (Applicant) v. M. Alzner Contractors Limited (Respondent) (*Granted*)

2549-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Lego General Contracting (Respondent) (*Withdrawn*)

2679-86-M: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Electrical Power Systems Construction Association and G.E. Young Diving & Marine Inc. (Respondents) (*Granted*)

2755-86-M: Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 1059 (Applicants) v. The Electrical Power Systems Construction Association, Ontario Hydro and John's Mansville Canada Ltd. (Respondents) (*Granted*)

2769-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. J. R. Carpentry Ltd. (Respondent) (*Withdrawn*)

2813-86-M: Ontario Sheet Metal Workers Conference (Applicant) v. E. S. Fox Limited, Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

2822-86-M: Labourers' International Union of North America, Local 607 (Applicant) v. Cencan Concrete & Tile Ltd. and/or Clarkson Gordon Inc. (Respondent) (*Granted*)

2828-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Macwall Forming Inc. (Respondent) (*Withdrawn*)

2830-86-M: International Brotherhood of Electrical Workers, Local 804 of the IBEW Construction Council of Ontario (Applicant) v. Classic Electric (Respondent) (*Granted*)

2840-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. J. D. Caulking Limited (Respondent) (*Dismissed*)

2856-86-M: The Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen (Applicant) v. Aldershot Flooring Limited (Respondent) (*Granted*)

2862-86-M: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7 Canada (Applicants) v. Joe Arban Contractor Ltd. (Respondent) (*Granted*)

2876-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. D.I. Construction Co. Inc. (Respondent) (*Withdrawn*)

2888-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Tony Dimonte Drainage Ltd. (Respondent) (*Withdrawn*)

2889-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Vex Concrete Forming (Respondent) (*Withdrawn*)

2901-86-M: International Brotherhood of Painters & Allied Trades Glaziers, Local 1795 (Applicant) v. Campbell Glass Limited (Respondent) (*Granted*)

2902-86-M: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Janin Building & Civil Works (1983) Ltd. (Respondent) (*Withdrawn*)

2903-86-M: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Janin Building & Civil Works (1983) Ltd. (Respondent) (*Withdrawn*)

2921-86-M: Resilient Floorworkers, Local 2965 (Applicant) v. Sullivan Marble & Tile Co. Ltd. (Respondent) (*Withdrawn*)

2928-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Kipling Paving Co. Ltd. (Respondent) (*Withdrawn*)

2929-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Tri-Lake Carpentry Limited (Respondent) (*Withdrawn*)

- 2930-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. THM Interlocking Ltd. (Respondent) (*Withdrawn*)
- 2931-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Lucy Construction Ltd. (Respondent) (*Withdrawn*)
- 2932-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Raftar Construction (Respondent) (*Withdrawn*)
- 2933-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Form Tech (567557 Ontario Ltd.) (Respondent) (*Withdrawn*)
- 2934-86-M:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7 Canada (Applicants) v. Bellai Bros. (Respondent) (*Granted*)
- 2935-86-M:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7 Canada (Applicants) v. Bectar Corporation (Respondent) (*Withdrawn*)
- 2936-86-M:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7 Canada (Applicant) v. R. R. Marcel Masonry Ltd. (Respondent) (*Withdrawn*)
- 2937-86-M:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7 Canada (Applicants) v. B. D. L. Contractors Ltd. (Respondent) (*Withdrawn*)
- 2947-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Pilan Properties Ltd. (Respondent) (*Withdrawn*)
- 2948-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Pineridge 1986 Ltd. (Respondent) (*Withdrawn*)
- 2949-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Luquan Carpentry (Respondent) (*Withdrawn*)
- 2950-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. D. W. Buchanan Construction Ltd. (Respondent) (*Withdrawn*)
- 2951-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Landford Developments Ltd., c.o.b. as Promark Carpentry (Respondent) (*Withdrawn*)
- 2972-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. All Star Carpentry Ltd. (Respondent) (*Withdrawn*)
- 3002-86-M:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Local 7 Canada (Applicant) v. Joe Arban Contractors Ltd. (Respondent) (*Withdrawn*)
- 3005-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Westney Heights Inc. (Respondent) (*Withdrawn*)
- 3009-86-M:** International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Landar Insulation Corp. Ltd. (Respondent) (*Withdrawn*)
- 3010-86-M:** International Association of Heat and Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. McBrien Insulation (Respondent) (*Withdrawn*)
- 3026-86-M:** International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Granted*)

3037-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Construction Line & Design Inc. (Respondent) (*Granted*)

3040-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Welding (Respondent) (*Withdrawn*)

3043-86-M: Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen (Applicant) v. McCulloch & Kolic Masonry Ltd. (Respondent) (*Granted*)

3067-86-M: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Jaddco Anderson Construction Ltd. (Respondent) (*Withdrawn*)

3081-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0460-84-R: Alliance Employees' Union (Applicant) v. Public Service Alliance of Canada (Respondent) v. The Ottawa Typographical Union, Local 102 (Intervener) (*Dismissed*)

2795-84-U: United Steelworkers of America (Complainant) v. Shaw-Almex Industries Limited (Respondent) v. Group of Employees (Interveners) (*Dismissed*)

0347-86-R: Richard Grandy (Applicant) v. The Ontario Pipe Trades Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Respondent) v. City Plumbing (Kitchener) Limited (Intervener) (*Dismissed*)

1321-86-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. The Upper Canada Brewing Company (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1374-86-R: Toronto-Central Ontario Building & Construction Trades Council and The International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicants) v. Elmont Construction Limited, Bruce N. Huntley Contracting Limited and 482575 Ontario Limited (Respondents) (*Dismissed*)

2079-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Frank Pellieg-rino General Contracting Limited (Respondent) (*Dismissed*)

APPLICATIONS FOR ACCREDITATION (CONSTRUCTION INDUSTRY)

1429-84-R: Interior Systems Contractors Association of Ontario (Applicant) v. International Brotherhood of Painters & Allied Trades and Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1891 (Respondents) v. Acoustical Association of Ontario (Intervener #1) v. Residential Painting Contractors of Ontario (Intervener #2) (*Granted*)

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